005-4ZK5625 (5) (7)

Nos. 08-240, 08-372

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IN THE

# Supreme Court of the United States

MAC'S SHELL SERVICE, INC., *ET AL.*,
*Petitioners*,

v

SHELL OIL PRODUCTS COMPANY LLC, *ET AL.*,
*Respondents*.

SHELL OIL PRODUCTS COMPANY LLC, *ET AL.*,
*Petitioners*,

v.

MAC'S SHELL SERVICE, INC., *ET AL.*,
*Respondents*.

**On Writ of Certiorari to the United States Court of Appeals for the First Circuit**

## JOINT APPENDIX

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**UNITED STATES DISTRICT COURT**
**DISTRICT OF MASSACHUSETTS (BOSTON)**

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Case No. 1:00-cv-11295-RWZ

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DEMETRIOS TSANIKLIDES, JR., LARRY RUBENSTEIN, ALI JABER, LASCO ENTERPRISES, PAUL SROCZYNSKI, J ENTERPRISES, INC., CHARLES LAGASSE, KACH CORPORATION, NIKOLAS MANOUSARIDIS, THE SHELL DEALERS DEFENSE GROUP,

*Plaintiffs*,

v.

SHELL OIL PRODUCTS COMPANY AND MOTIVA ENTERPRISES,

*Defendants*.

---

**RELEVANT DOCKET ENTRIES**

| DATE | No. | PROCEEDINGS |
|---|---|---|
| 06/03/2000 | 1 | Complaint filed. Case assigned to Judge: Zobel. Receipt#: 23486 Amount: $150.00. Fee Status: pd (jdj) (Entered: 07/05/2000) |
| | | * * * * * |
| 09/01/2000 | 5 | Answer by Shell Oil Products, Motiva Enterprises to complaint; jury demand, filed. (jdj) (Entered: 09/06/2000) |
| | | * * * * * |

| DATE | No. | PROCEEDINGS |
|---|---|---|
| 10/05/2000 | 7 | Motion by Shell Oil Products, Motiva Enterprises to dismiss, filed cs. (jdj) (Entered: 10/05/2000) |
| 10/05/2000 | 8 | Memorandum by Shell Oil Products, Motiva Enterprises in support of [7-1] motion to dismiss, filed. (jdj) (Entered: 10/05/2000) |
| | | * * * * * |
| 11/01/2000 | 14 | Memorandum by Demetrios Tsaniklides Jr., Larry Rubenstein, Ali Jaber, Lasco Enterprises, Paul Sroczynski, J Enterprises, Inc., Charles Lagasse, Kach Corporation, Nikolas Manousaridis, The Shell Dealers in opposition to [7-1] motion to dismiss, filed. (jdj) (Entered: 11/02/2000) |
| 11/07/2000 | 15 | Reply by Shell Oil Products, Motiva Enterprises to response to [7-1] motion to dismiss, filed. (jdj) (Entered: 11/07/2000) |
| | | * * * * * |
| 11/14/2000 | 16 | Judge Rya W. Zobel. Clerk's Notes: re: motion hearing held [7-1] motion to dismiss taken under advisement Court Reporter: McLaughlin (jdj) (Entered: 11/17/2000) |
| | | * * * * * |
| 03/07/2001 | 18 | Judge Rya W. Zobel. Clerk's Notes: re: scheduling conference held: Judge decides a part of motion to dismiss and has |

| DATE | No. | PROCEEDINGS |
|---|---|---|
| | | another part to decide and will do that in a memorandum and order. (jdj) (Entered: 03/07/2001) |
| 03/15/2001 | | Judge Rya W. Zobel. Endorsed Order entered granting in part, denying in part [7-1] motion to dismiss. [EOD Date 3/16/01] cc/cl (jdj) (Entered: 03/16/2001) |
| | | * * * * * |
| 05/01/2001 | 20 | Motion by Demetrios Tsaniklides Jr. for preliminary injunction, filed. (jdj) (Entered: 05/01/2001) |
| 05/01/2001 | 21 | Memorandum by Demetrios Tsaniklides Jr. in support of [20-1] motion for preliminary injunction, filed. (jdj) (Entered: 05/01/2001) |
| 05/01/2001 | 22 | Affidavit of Demetrios Tsaniklides Jr., re: [20-1] motion for preliminary injunction, filed. (jdj) (Entered: 05/01/2001) |
| 05/02/2001 | 23 | Motion by Demetrios Tsaniklides Jr., Larry Rubenstein, Ali Jaber, Lasco Enterprises, Paul Sroczynski, J Enterprises, Inc., Charles Lagasse, Kach Corporation, Nikolas Manousaridis, The Shell Dealers to amend [1-1] complaint, filed. (jdj) (Entered: 05/02/2001) |
| 05/09/2001 | | Judge Rya W. Zobel. Endorsed Order entered granting [19-1] motion to amend [5-1] answer. cc/cl [EOD Date 5/9/01] (jdj) (Entered: 05/09/2001) |

| DATE | No. | PROCEEDINGS |
|---|---|---|
| 05/09/2001 | 24 | STIPULATION by Demetrios Tsaniklides Jr., Larry Rubenstein, Ali Jaber, Lasco Enterprises, Paul Sroczynski, J Enterprises, Inc., Charles Lagasse, Kach Corporation, Nikolas Manousaridis, The Shell Dealers, Shell Oil Products, Motiva Enterprises, Response to motion reset to 5/29/01 for [23-1] motion to amend [1-1] complaint, filed cs. (jdj) (Entered: 05/09/2001) |
| 05/14/2001 | | Withdrawal of [20-1] motion for preliminary injunction. (lau) (Entered: 05/14/2001) |
| 05/14/2001 | 25 | Plaintiff Demetrios Tsanikilides, Jr.'s withdrawal of motion for Preliminary Injunction, filed. (lau) (Entered: 05/14/2001) |
| 05/16/2001 | 26 | Motion by Shell Oil Products to transfer venue, filed cs. (jdj) (Entered: 05/16/2001) |
| | | * * * * * |
| 05/17/2001 | 28 | Amended Answer to Complaint by Shell Oil Products, Motiva Enterprises, filed cs. Answer amends [5-1] answer; jury demand (jdj) (Entered: 05/17/2001) |
| 05/29/2001 | 29 | Response by Demetrios Tsaniklides Jr., Larry Rubenstein, Ali Jaber, Lasco Enterprises, Paul Sroczynski, J Enterprises, Inc., Charles Lagasse, Kach Corporation, Nikolas Manousaridis, The Shell Dealers in opposition to [26-1] mo- |

| DATE | No. | PROCEEDINGS |
|---|---|---|
| | | tion to transfer venue, filed cs. (jdj) (Entered: 05/30/2001) |
| 05/29/2001 | 30 | Memorandum by Demetrios Tsaniklides Jr., Larry Rubenstein, Ali Jaber, Lasco Enterprises, Paul Sroczynski, J Enterprises, Inc., Charles Lagasse, Kach Corporation, Nikolas Manousaridis, The Shell Dealers in opposition to [26-1] motion to transfer venue, filed cs. (jdj) (Entered: 05/30/2001) |
| 05/29/2001 | 31 | Response by Shell Oil Products, Motiva Enterprises in opposition to [23-1] motion to amend [1-1] complaint, filed cs. (jdj) (Entered: 05/30/2001) |
| | | * * * * * |
| 06/12/2001 | | Judge Rya W. Zobel. Endorsed Order entered granting [26-1] motion to transfer venue. The cases shall be transferred to New Hampshire and Rhode Island [EOD Date 6/12/01] (jdj) (Entered: 06/12/2001) |
| 06/12/2001 | | Judge Rya W. Zobel. Endorsed Order entered denying [23-1] motion to amend [1-1] complaint. Plaintiffs may file a new case which may be deemed related [EOD Date 6/12/01] cc/cl (jdj) (Entered: 06/12/2001) |
| | | * * * * * |
| 08/10/2001 | 38 | Stipulation of dismissal by Demetrios Tsaniklides Jr. in 1:00-cv-11295, Larry |

| DATE | No. | PROCEEDINGS |
|---|---|---|
| | | Rubenstein in 1:00-cv-11295, Ali Jaber in 1:00-cv-11295, Lasco Enterprises in 1:00-cv-11295, Paul Sroczynski in 1:00-cv-11295, J Enterprises, Inc. in 1:00-cv 11295, Charles Lagasse in 1:00-cv-11295, Kach Corporation in 1:00-cv-11295, Nikolas Manousaridis in 1:00-cv-11295, The Shell Dealers in 1:00-cv-11295, Shell Oil Products in 1:00-cv-11295, Motiva Enterprises in 1:00-cv-11295 w/out prejudice, filed cs. (jdj) (Entered: 08/13/2001) |
| 08/10/2001 | | Case closed. (jdj) (Entered: 08/13/2001) |
| 09/07/2001 | 39 | TRANSCRIPT of Motion to Dismiss Hearing held on November 14, 2000 before Judge Zobel. Court Reporter: Jim McLaughlin. The original transcripts are maintained by the Clerk's Office. Copies may be obtained by contacting the court reporter at 617/320-1173 or the Clerk's Office. (Scalfani, Deborah) |

**UNITED STATES DISTRICT COURT**
**DISTRICT OF MASSACHUSETTS (BOSTON)**

Case No. 1:01-cv-11300-RWZ

FRANCIS MARCOUX, RONNIE ABOUD, ABRAHAM ABRAHAM, MAHENDRS AMIN, MASSOUD ATALISH, MIKE ATALISH, JORDAN AVRAMIDIS, CHRISS AZAZIAN, RICHARD BAIMA, ED BAKER, STEVE BLACK, DOUGLASS CHAPMAN, JAMES COGGESHALL, MICHAEL CORBETT, PATRICIA DASILVA, ALEX DASILVA, STEVE FALCONE, GEORGE FONTAINE, BILL FONTAINE, CAMILLE FRANCIS, STEVE FRANGIAS, MATTY GAETA, DONALD GAGNON, JOHN GENEROSO, JOHN GOLDEN, KAL HAMZE, ABRAHAM HAMZE, TIBOR HANGYAL, PATRICK HINES, ADAM HIPP, MUHAMMAD IMATIAZ, JAY JON, KAY JON, ABDUL KAFAL, JAQUE KANAAN, GEORGE KANTARGES, JIM KANTAROWSKI, CYNTHIA KAROL, WILLIAM KAUFMAN, JOE KELLEHER, HUSSEIN KOBESSI, MIKE LAMARCHE, RICHARD MELANSON, AKMA[L] MOAWED, JAMES MORAIDIS, SUNNY PATEL, CONSTANTIN PEIDES, RUSSELL PICARD, STEPH[E]N PISARC[Z]YK, SID PRASH[A]D, PAUL RICHARDS, HARVY RUDNICK, FRED SAAD, AZIZ SABA, WALID SAMROUT, EARL STICKNEY, THOMAS SULLIVAN, ROGER THIBAULT, DIMITRIOUS TSANIKILIDES, TOUFIC ATALLAH, DROR DUSDUSHMAN, EARL MCLAUGHLIN, STEPHEN SHEA, JOHN SULLIVAN, WILSON TIBURTINO, J. ENTERPRISE, INC., LASCO ENTERPRISE, INC., NIKOLAS MANOUSARIDIS, LARRY RUBENSEIN, PAUL SROCZYNSKI, JES SERVICE, INC., MAC'S SHELL SERVICE, INC.,

*Plaintiffs,*

V.

SHELL OIL PRODUCTS COMPANY, MOTIVA ENTERPRISE[S], AND SHELL OIL COMPANY,

*Defendants.*

---

**RELEVANT DOCKET ENTRIES**

| DATE | No. | PROCEEDINGS |
|---|---|---|
| 07/27/2001 | 1 | Complaint filed. Case assigned to Judge: Zobel. Receipt#: 32756 Amount: $150.00. Fee Status: pd (jdj) (Entered: 07/30/2001) |
| | | * * * * * |
| 08/06/2001 | 4 | Amended complaint by Francis Marcoux in 1:01-cv-11300 filed. (Answer due 8/16/01 for Motiva Enterprise[s], for Shell Oil Products). Amended complaint amends [1-1] complaint; (jdj) (Entered: 08/07/2001) |
| | | * * * * * |
| 08/10/2001 | 8 | Amended complaint by Francis Marcoux in 1:01-cv-11300 filed. (Answer due 8/20/01 for Motiva Enterprise[s], for Shell Oil Products). Amended complaint amends [4-1] amended complaint. filed cs (jdj) (Entered: 08/13/2001) |
| | | * * * * * |
| 09/04/2001 | 10 | Answer by Shell Oil Products in 1:01-cv-11300, Motiva Enterprise[s] in 1:01-cv-11300 to complaint; jury demand, filed. (lau) (Entered: 09/04/2001) |

| DATE | No. | PROCEEDINGS |
|---|---|---|
| | | * * * * * |
| 01/10/2002 | 30 | Motion by Francis Marcoux et al. in 1:01-cv-11300 to amend [4-1] amended complaint, filed cs. (jdj) (Entered: 01/14/2002) |
| | | * * * * * |
| 01/31/2002 | 71 | Judge Rya W. Zobel. Clerk's Notes: re: motion hearing held granting [25-1] motion for Robert E. Weiner to withdraw as attorney. A letter from Mr. Weiner to all parties not represented by Greenberg Trau[r]ig, indicating that he has filed a motion to w/draw, and that anyone who wishes to proceed w/the case needs to contact new counsel (or Greenberg Trau[r]ig) and have new counsel enter appearance by 2/28/02. case will proceed w/new counsel in the interim. Parties will collaborate on the letter from Mr. Weiner to unrepresented Plaintiffs. Court Reporter: McLaughlin (jdj) (Entered: 02/05/2002) |
| 02/20/2002 | | Judge Rya W. Zobel. Endorsed Order entered granting [30-1] motion to amend [4-1] amended complaint. cc/cl [EOD Date 2/20/02] (jdj) (Entered: 02/20/2002) |
| 03/01/2002 | 72 | Motion by Francis Marcoux [et al.] to transfer and coordination, filed. (jdj) (Entered: 03/01/2002) |
| | | * * * * * |

| DATE | No. | PROCEEDINGS |
|---|---|---|
| 03/15/2002 | 78 | Motion by Shell Oil Products in 1:01-cv-11300 to dismiss, and for judgment on the pleadings, filed cs. (jdj) (Entered: 03/19/2002) |
| 03/15/2002 | 79 | Memorandum by Shell Oil Products in 1:01-cv-11300 in support of [78-1] motion to dismiss, [78-2] [ ] and for judgment on the pleadings, filed cs. (jdj) (Entered: 03/19/2002) |
| | | * * * * * |
| 04/30/2002 | 82 | Judge Rya W. Zobel. Order of Dismissal entered. [EOD Date 4/30/02] cc/cl (jdj) (Entered: 04/30/2002) |
| 05/01/2002 | 83 | Response by Francis Marcoux et al. in 1:01-cv-11300 in opposition to [78-1] motion to dismiss, [78-2] [ ] and for judgment on the pleadings, filed cs. (jdj) (Entered: 05/02/2002) |
| 05/01/2002 | 84 | Memorandum by Francis Marcoux et al. in 1:01-cv-11300 in support of [83-1] opposition response, filed cs. (jdj) (Entered: 05/02/2002) |
| | | * * * * * |
| 05/10/2002 | 87 | Reply by Shell Oil Products in 1:01-cv-11300, Motiva Enterprise[s] in 1:01-cv-11300 [in] response to [78-1] motion to dismiss, [78-2] [ ] and for judgment on the pleadings, filed cs. (jdj) (Entered: 05/10/2002) |

| DATE | No. | PROCEEDINGS |
|---|---|---|
| | | * * * * * |
| 05/14/2002 | 89 | Response by Francis Marcoux in 1:01-cv-11300 in opposition to [78-1] motion to dismiss, [78-2] [ ] and for judgment on the pleadings, filed cs. (jdj) (Entered: 05/16/2002) |
| 05/17/2002 | 90 | Transcript of proceedings [ ] held on proceeding date: 5/9/02 before Judge: Zobel. Court Reporter: James McLaughlin (jdj) (Entered: 05/17/2002) |
| 07/03/2002 | | MDL 1:01-430 transferred to this District for pretrial proceedings. Master Docket assigned as 01-cv-11300 (jdj) (Entered: 07/16/2002) |
| | | * * * * * |
| 07/12/2002 | | MDL 1:01-514 transferred to this District for pretrial proceedings. Master Docket assigned as 01-11300 (jdj) (Entered: 07/16/2002) |
| | | * * * * * |
| 08/16/2002 | 93 | Supplemental Memorandum by Shell Oil Products in 1:01-cv-11300, Motiva Enterprise[s] in 1:01-cv-11300 re: defendants[']motions to dismiss and for judgment on the pleadings. filed cs. (jdj) (Entered: 08/20/2002) |
| 08/26/2002 | 94 | Supplemental Memorandum by Francis Marcoux in 1:01-cv-11300 re: plaintiffs[']opposition to defendants[']motion to |

| DATE | No. | PROCEEDINGS |
|---|---|---|
| | | dismiss and motion for judgment on the pleadings filed. (jdj) (Entered: 08/26/2002) |
| 10/07/2002 | 95 | Judge Rya W. Zobel. Memorandum and Order entered granting in part, denying in part [78-1] motion to dismiss, granting in part, denying in part [78- 2] motion [ ] for judgment on the pleadings. Accordingly, the defendants' motion to dismiss and motion for judgment on the pleadings as to the plaintiffs['] fraud and misrepresentation claim is [a]llowed. As to all other claims, the motions are denied. Entered cc/cl [EOD Date 10/7/02] (lau) (Entered: 10/07/2002) |
| | | * * * * * |
| 10/29/2002 | 97 | Judge Rya W. Zobel. Clerk's Notes: re: scheduling conference held, Ten cases to go forward first, automatic discovery [by] plaintiffs to be complete by the end of November; fact discovery to be complete by mid-[F]ebruary[;] set pretrial conference for 2:00 3/13/03 Court Reporter: (jdj) (Entered: 10/30/2002) |
| | | * * * * * |
| 12/03/2002 | 107 | Motion by (Shell Dealers) Francis Marcoux et al. in 1:01-cv-11300 to amend [1-1] complaint, filed cs. (jdj) (Entered: 12/04/2002) |
| | | * * * * * |

| DATE | No. | PROCEEDINGS |
|---|---|---|
| 12/12/2002 | 111 | Judge Rya W. Zobel. Clerk's Notes: re: status conference held, Court is to pick 10 plaintiffs; decide motion to amend complaint[s]; complete discovery re: 10 plaintiffs by 4/30/03; experts by 2/14/03 set pretrial conference for 2:00 5/28/03, set expert discovery due for 5/23/03 (jdj) (Entered: 12/16/2002) |
| | | * * * * * |
| 01/10/2003 | | Judge Rya W. Zobel. Endorsed Order entered granting [107-1] motion to amend [1-1] complaint. cc/cl [EOD Date 1/13/03] (jdj) Modified on 01/13/2003 (Entered: 01/13/2003) |
| 01/13/2003 | 119 | Judge Rya W. Zobel. Order: The court selects the following plaintiffs for the first trial: J&M Avramidis[ ] (dba Walpole Shell)[;] Three Ks, Inc.; Cynthia Karol (dba Pleasant St Shell)[;] Mac's Shell Service, Inc.; RAM Corp; Akma[l], Inc.; Stephen Pisa[r]czyk; Sid Prashad (dba Madison Shell)[;] Reading Shell & Tire Center; John A. Sullivan. entered. cc/cl [EOD Date 1/13/03] (jdj) (Entered: 01/13/2003) |
| 01/13/2003 | 120 | Second Amended complaint by Francis Marcoux et al. in 1:01-cv-11300 filed. (Answer due 1/23/03 for Motiva Enterprise[s], for Shell Oil Products). Amended complaint amends [4-1] amended complaint. (jdj) Modified on 01/13/2003 |

| DATE | No. | PROCEEDINGS |
|---|---|---|
| | | (Entered: 01/13/2003) |
| | | * * * * * |
| 04/16/2003 | 124 | Answer by Motiva Enterprise[s] (as to Mac's Shell Service, Inc.) in 1:01-cv-11300 to complaint; jury demand, filed cs. (jdj) Modified on 04/17/2003 (Entered: 04/16/2003) |
| 04/16/2003 | 125 | Answer by Shell Oil Products (as to Mac's Shell Service, Inc.) in 1:01-cv-11300 to complaint; jury demand, filed cs. (jdj) Modified on 04/17/2003 (Entered: 04/16/2003) |
| 04/16/2003 | 126 | Answer by Shell Oil Company (as to Mac's Shell Service, Inc.) in 1:01-cv-11300 to complaint; jury demand, filed cs. (jdj) Modified on 04/17/2003 (Entered: 04/16/2003) |
| | | * * * * * |
| 07/30/2003 | 149 | MOTION for Preliminary Injunction by Abraham Abraham [et al.]. (Document filed under Seal) (Johnson, Jay) (Entered: 07/31/2003) |
| | | * * * * * |
| 07/30/2003 | 153 | SEALED DOCUMENT (Affidavit of counsel in support of plaintiffs['] request for injunctive relief) placed in secure file room. (Johnson, Jay) (Entered: 08/01/2003) |

| DATE | No. | PROCEEDINGS |
|---|---|---|
| 07/30/2003 | 154 | AFFIDAVIT of Joseph Kelleher. (Johnson, Jay) (Entered: 08/01/2003) |
| 07/30/2003 | 155 | AFFIDAVIT of Donald Gagnon. (Johnson, Jay) (Entered: 08/01/2003) |
| 07/30/2003 | 156 | AFFIDAVIT of Jose Bento. (Johnson, Jay) (Entered: 08/01/2003) |
| 07/30/2003 | 157 | AFFIDAVIT of John Generoso. (Johnson, Jay) (Entered: 08/01/2003) |
| 07/30/2003 | 158 | AFFIDAVIT of Richard Baima. (Johnson, Jay) (Entered: 08/01/2003) |
| 07/30/2003 | 159 | AFFIDAVIT of James Kantarowski. (Johnson, Jay) (Entered: 08/01/2003) |
| 07/30/2003 | 160 | AFFIDAVIT of Cynthia Karol. (Johnson, Jay) (Entered: 08/01/2003) |
| 07/30/2003 | 161 | AFFIDAVIT of George Fontaine. (Johnson, Jay) (Entered: 08/01/2003) |
| | | * * * * * |
| 10/22/2003 | 171 | Judge Rya W. Zobel: Endorsed ORDER entered denying 149 Motion for Preliminary Injunction, granting 152 (Sealed Motion) plaintiff's motion to compel to the extent defendants have not already responded to plaintiffs['] interrogatories and motion for sanctions is allowed in the amount of plaintiffs' attorneys' fees and costs for preparing the 2 discovery motions; counsel shall file the requisite affidavits, denying 166 Motion for Default Judgment without prej[ud]ice. Defendant's motion for sanctions is denied. |

| DATE | No. | PROCEEDINGS |
|---|---|---|
| | | (Urso, Lisa) (Entered: 10/23/2003) |
| | | * * * * * |
| 03/16/2004 | | Judge Rya W. Zobel: Endorsed ORDER entered denying 186 Motion for TRO. Provided that defendant shall, at the time of delivery of gasoline notify any plaintiff whose inventory is increased by more than 10% over the former cap as a result of the use of the AIM program. Defendant shall also, upon request of any plaintiff, afford the plaintiff a period of 30 days to pay for any such increase. (Urso, Lisa) (Entered: 03/16/2004) |
| 03/16/2004 | | Judge Rya W. Zobel: Endorsed ORDER entered denying 187 Motion to Amend (Urso, Lisa) (Entered: 03/16/2004) |
| | | * * * * * |
| 04/08/2004 | 209 | MOTION for Relief From or Clarification re Order on Motion for TRO, by Motiva Enterprise, Shell Oil Company, Shell Oil Products Company. (Johnson, Jay) (Entered: 04/09/2004) |
| | | * * * * * |
| 05/03/2004 | | Judge Rya W. Zobel: endorsed ORDER entered granting 209 Motion for Clarification. Defendant's request to eliminate the notice and 30 day billing procedure is allowed on defendant's representation that it will reinstate the delivery caps. |

| DATE | No. | PROCEEDINGS |
|---|---|---|
| | | Defendant[s] agreed to lift them only for limited periods during the winter and emergencies and on prior notice to the dealers. (Urso, Lisa) (Entered: 05/05/2004) |
| 05/04/2004 | 216 | MOTION for Summary Judgment as to plaintiffs Three K's, John A. Sullivan, Reading Shell & Tire Center, Ram Corp. and Stephen Pisarczyk based on their release of claims by Motiva Enterprise[s], Shell Oil Company, Shell Oil Products Company. (Urso, Lisa) (Entered: 05/07/2004) |
| | | * * * * * |
| 05/04/2004 | 218 | MEMORANDUM in Support re 216 MOTION for Summary Judgment filed by Motiva Enterprise[s], Shell Oil Company, Shell Oil Products Company. (Urso, Lisa) (Entered: 05/07/2004) |
| | | * * * * * |
| 05/04/2004 | 219 | AFFIDAVIT of Peter W. Benner re 216 MOTION for Summary Judgment by Motiva Enterprise[s], Shell Oil Company, Shell Oil Products Company. (Urso, Lisa) (Entered: 05/07/2004) |
| | | * * * * * |
| 06/14/2004 | 224 | Opposition re 216 MOTION for Summary Judgment filed by Abraham Abraham [et al.]. (Johnson, Jay) (Entered: |

| DATE | No. | PROCEEDINGS |
|---|---|---|
| | | 06/15/2004) |
| 06/15/2004 | 225 | MOTION for Summary Judgment by Motiva Enterprise[s], Shell Oil Company, Shell Oil Products Company. (Johnson, Jay) (Entered: 06/15/2004) |
| 06/15/2004 | 226 | MEMORANDUM in Support re 225 MOTION for Summary Judgment filed by Motiva Enterprise[s], Shell Oil Company, Shell Oil Products Company. (Johnson, Jay) (Entered: 06/15/2004) |
| 06/15/2004 | 227 | AFFIDAVIT of Peter W. Benner re 225 MOTION for Summary Judgment. (Johnson, Jay) (Entered: 06/15/2004) |
| | | * * * * * |
| 06/22/2004 | 229 | REPLY to Response to Motion re 216 MOTION for Summary Judgment filed by Shell Oil Company, Shell Oil Products Company. (Spaulding, Cathryn) (Entered: 06/22/2004) |
| | | * * * * * |
| 07/09/2004 | 241 | Response to defendants['] statement of facts pursuant to LR 56.1 by Abraham Abraham [et al.]. (Johnson, Jay) (Entered: 07/13/2004) |
| 07/09/2004 | 242 | Plaintiffs['] Opposition re 225 SECOND MOTION for Summary Judgment filed by Abraham Abraham [et al.]. (Johnson, Jay) (Entered: 07/13/2004) |
| | | * * * * * |

| DATE | No. | PROCEEDINGS |
|---|---|---|
| 07/09/2004 | 244 | PLAINTIFFS['] MEMORANDUM in Opposition re 225 MOTION for Summary Judgment filed by Abraham Abraham et al. (Johnson, Jay) (Entered: 07/13/2004) |
| 07/09/2004 | 245 | AFFIDAVIT of Allison K. Jones in Support re 242 Opposition to Defendants['] Motion for summary judgment. (Johnson, Jay) (Entered: 07/13/2004) |
| 07/09/2004 | 246 | AFFIDAVIT of Robert Weiner. (Johnson, Jay) (Entered: 07/13/2004) |
| | | * * * * * |
| 08/10/2004 | 251 | Response to defendants['] statement of facts pursuant to local rule 56.1 by Francis Marcoux et al. (Johnson, Jay) (Entered: 08/10/2004) |
| 08/10/2004 | 252 | AFFIDAVIT of Counsel in Support of Plaintiffs['] Opposition to Defendants['] Motion for Summary Judgment w/attachments. (Johnson, Jay) (Entered: 08/10/2004) |
| 08/10/2004 | 253 | AFFIDAVIT by Steph[e]n Pisarc[z]yk. (Johnson, Jay) (Entered: 08/10/2004) |
| 08/10/2004 | 254 | AFFIDAVIT by Stephen Shea. (Johnson, Jay) (Entered: 08/10/2004) |
| 08/10/2004 | 255 | AFFIDAVIT by John Sullivan. (Johnson, Jay) (Entered: 08/10/2004) |
| 08/10/2004 | 256 | AFFIDAVIT by Richard Melanson. (Johnson, Jay) (Entered: 08/10/2004) |

| DATE | No. | PROCEEDINGS |
|---|---|---|
| 08/10/2004 | 257 | AFFIDAVIT by Abdul Kafal. (Johnson, Jay) (Entered: 08/10/2004) |
| 08/10/2004 | 258 | AFFIDAVIT of Brian Gorin. (Johnson, Jay) (Entered: 08/10/2004) |
| 08/10/2004 | 259 | AFFIDAVIT of Fred Bucklin. (Johnson, Jay) (Entered: 08/10/2004) |
| 08/10/2004 | 260 | AFFIDAVIT of Jeffrey Bernard. (Johnson, Jay) (Entered: 08/10/2004) |
| 08/11/2004 | 261 | Judge Rya W. Zobel: ORDER on Application for Sanctions entered. Fees in the amount of $7,300 and costs in the amount of $306.58. (Urso, Lisa) (Entered: 08/11/2004) |
| 08/12/2004 | 262 | MOTION for Summary Judgment on all claims by Motiva Enterprise[s], Shell Oil Company, Shell Oil Products Company. (Johnson, Jay) (Entered: 08/12/2004) |
| 08/12/2004 | 263 | MEMORANDUM in Support re 262 MOTION for Summary Judgment filed by Motiva Enterprise[s], Shell Oil Company, Shell Oil Products Company. (Johnson, Jay) (Entered: 08/12/2004) |
| 08/12/2004 | 264 | NOTICE of ADDENDA by Motiva Enterprise[s], Shell Oil Company, Shell Oil Products Company re 262 MOTION for Summary Judgment (Johnson, Jay) (Entered: 08/12/2004) |

* * * * *

| DATE | No. | PROCEEDINGS |
|---|---|---|
| 09/14/2004 | 267 | Opposition re 262 THIRD MOTION for Summary Judgment filed by Francis Marcoux. (Johnson, Jay) (Entered: 09/14/2004) |
| | | * * * * * |
| 09/14/2004 | 269 | Response to Defendants['] Statement of Facts Pursuant to LR 56.1 by Francis Marcoux et al. (Johnson, Jay) (Entered: 09/14/2004) |
| 09/14/2004 | 270 | AFFIDAVIT of John F. Farraher Jr. re 267 Opposition to Motion for summary judgment. (Johnson, Jay) (Entered: 09/14/2004) |
| 09/14/2004 | 271 | AFFIDAVIT of Robert Weiner re 267 Opposition to Motion for summary judgment. (Johnson, Jay) (Entered: 09/14/2004) |
| 09/14/2004 | 272 | AFFIDAVIT re 267 Opposition to Motion for summary judgment by Jordan Avramidis. (Johnson, Jay) (Entered: 09/14/2004) |
| 09/14/2004 | 273 | SUPPLEMENTAL AFFIDAVIT by Jordan Avramidis. (Johnson, Jay) (Entered: 09/14/2004) |
| 09/14/2004 | 274 | AFFIDAVIT by Abdul Kafal. (Johnson, Jay) (Entered: 09/14/2004) |
| 09/14/2004 | 275 | AFFIDAVIT by Cynthia Karol. (Johnson, Jay) (Entered: 09/14/2004) |
| 09/14/2004 | 276 | AFFIDAVIT by Richard Melanson. (Johnson, Jay) (Entered: 09/14/2004) |

| DATE | No. | PROCEEDINGS |
|---|---|---|
| 09/14/2004 | 277 | AFFIDAVIT by Francis Marcoux. (Johnson, Jay) (Entered: 09/14/2004) |
| 09/14/2004 | 278 | AFFIDAVIT by Akma[l] Moawed. (Johnson, Jay) (Entered: 09/14/2004) |
| 09/14/2004 | 279 | AFFIDAVIT by Steph[e]n Pisarc[z]yk. (Johnson, Jay) (Entered: 09/14/2004) |
| 09/14/2004 | 280 | AFFIDAVIT by Sid Prash[a]d. (Johnson, Jay) (Entered: 09/14/2004) |
| 09/14/2004 | 281 | AFFIDAVIT by Stephen Shea. (Johnson, Jay) (Entered: 09/14/2004) |
| 09/14/2004 | 282 | AFFIDAVIT by John Sullivan. (Johnson, Jay) (Entered: 09/14/2004) |
| 09/14/2004 | 283 | MEMORANDUM in Opposition re 262 THIRD MOTION for Summary Judgment filed by Francis Marcoux. (Johnson, Jay) (Entered: 09/14/2004) |
| | | * * * * * |
| 10/25/2004 | 293 | Judge Rya W. Zobel: Memorandum of Decision entered denying 216 Motion for Summary Judgment, denying 225 Motion for Summary Judgment, granting 262 Motion for Summary Judgment as to Three K's and Stephen Pisarczyk. Entered (Urso, Lisa) (Entered: 10/26/2004) |
| | | * * * * * |
| 10/28/2004 | 296 | EMERGENCY MOTION for Limited Reconsideration of the entry of summary judgment against Plaintiff Ste- |

| DATE | No. | PROCEEDINGS |
|---|---|---|
| | | phen Pisarczyk by Francis Marcoux. (Johnson, Jay) (Entered: 10/29/2004) |
| 10/28/2004 | 297 | EMERGENCY MOTION for Reconsideration of Court[']s 10/25/04 Memorandum and Decision w/respect to defendants[']] Motions for Summary Judgment by Motiva Enterprise[s], Shell Oil Company, Shell Oil Products Company. (Johnson, Jay) (Entered: 10/29/2004) |
| | | * * * * * |
| 11/02/2004 | 303 | Opposition re 297 MOTION for Reconsideration filed by Shell Oil Company. (Attachments: #1 Affidavit) (Spaulding, Cathryn) (Entered: 11/02/2004) |
| 11/03/2004 | | [E]lectronic Clerk's Notes for proceedings held before Judge Rya W. Zobel: Initial Pretrial Conference held on 11/3/2004. Jury Trial reset for 11/15/2004 09:00 AM in Courtroom 12 before Judge Rya W. Zobel. Pretrial Conference set for 11/12/2004 09:00 AM before Judge Rya W. Zobel. Parties are engaging in mediation; (Urso, Lisa) (Entered: 11/03/2004) |
| | | * * * * * |
| 11/12/2004 | | [E]lectronic Clerk's Notes for proceedings held before Judge Rya W. Zobel : Final Pretrial Conference held on 11/12/2004. 9 jurors; (Court Reporter Romanow.) (Urso, Lisa) (Entered: |

| DATE | No. | PROCEEDINGS |
|---|---|---|
| | | 11/15/2004) |
| | | * * * * * |
| 11/15/2004 | | Electronic Clerk's Notes for proceedings held before Judge Rya W. Zobel: Jury Selection held on 11/15/2004. Jury of nine selected and sworn. Plaintiff's opening, defendant's opening. (Court Reporter Romanow.) (Hurley, Virginia) (Entered: 11/29/2004) |
| 11/16/2004 | | Electronic Clerk's Notes for proceedings held before Judge Rya W. Zobel: Jury Trial day two held on 11/16/2004; plaintiff witness #1 Cindy Karol, cross, redirect, recross; witness #2 John Sullivan (Court Reporter Romanow.) (Hurley, Virginia) (Entered: 12/01/2004) |
| | | * * * * * |
| 11/17/2004 | | Electronic Clerk's Notes for proceedings held before Judge Rya W. Zobel: Jury Trial day 3 held on 11/17/2004; continued of John Sullivan; witness #3 Akmal Moawed; d[ir]ect; (Court Reporter Shelley.) (Urso, Lisa) (Entered: 12/01/2004) |
| 11/18/2004 | | Electronic Clerk's Notes for proceedings held before Judge Rya W. Zobel: Jury Trial Day Four held on 11/18/2004; continued [c]ross of Akmal Moawed; redirect; re-cros[s]; video deposition of Michael Hanl[e]y; video deposition of |

| DATE | No. | PROCEEDINGS |
|---|---|---|
| | | Laura Styslinger; (Court Reporter Shelley.) (Urso, Lisa) (Entered: 12/01/2004) |
| 11/19/2004 | 307 | TRANSCRIPT of Jury Trial Day Three held on November 17, 2004 before Judge Zobel. Court Reporter: Shelly M. Killian. * * * (Entered: 11/19/2004) |
| 11/19/2004 | 308 | TRANSCRIPT of Jury Trial Day Four held on November 18, 2004 before Judge Zobel. Court Reporter: Shelly M. Killian. * * * (Entered: 11/19/2004) |
| 11/19/2004 | | Electronic Clerk's Notes for proceedings held before Judge Rya W. Zobel: Jury Trial Day 5 held on 11/19/2004; plaintiff witness #6 Greg McCombs; direct; cross; re-direct; plaintiff witness #7 Frances Marcoux; direct; cross; (Court Reporter Shelley.) (Urso, Lisa) (Entered: 12/01/2004) |
| 11/22/2004 | 309 | TRANSCRIPT of Jury Trial Day Five held on November 19, 2004 before Judge Zobel. Court Reporter: Shelly M. Killian. * * * (Entered: 11/22/2004) |
| | | * * * * * |
| 11/22/2004 | | Electronic Clerk's Notes for proceedings held before Judge Rya W. Zobel: Jury Trial Day Six held on 11/22/2004; continued cross of Frances Marcoux (#7); video deposition of Eugen[ ]e John Goll; witness #9 Richard Melanson; direct; cross; (Court Reporter Shelley.) (Urso, Lisa) (Entered: 12/01/2004) |

| DATE | No. | PROCEEDINGS |
|---|---|---|
| | | * * * * * |
| 11/23/2004 | | Electronic Clerk's Notes for proceedings held before Judge Rya W. Zobel: Jury Trial Day Seven held on 11/23/2004; continued cross of Melanson; re-direct; re-cross; plaintiff's witness #10 Sid Prash[a]d; direct; cross; re-direct; witness #11 Jordanis Avramidis; direct; cross; re-direct; re-cross; (Court Reporter Shelley.) (Urso, Lisa) (Entered: 12/01/2004) |
| 11/24/2004 | | Electronic Clerk's Notes for proceedings held before Judge Rya W. Zobel: Jury Trial Day Eight held on 11/24/2004; plaintiff's expert Frank R. Zito; direct; cross; expert Fred W. Bucklin; direct; cross; expert witness Jeffrey Bernard; direct; cross; (Court Reporter Shelley.) (Urso, Lisa) (Entered: 12/01 /2004) |
| 11/29/2004 | 310 | TRANSCRIPT of Jury Trial Day Seven held on November 23, 2004 before Judge Zobel. Court Reporter: Debra M. Joyce. * * * (Entered: 11/29/2004) |
| 11/29/2004 | 311 | TRANSCRIPT of Jury Trial Day Eight held on November 24, 2004 before Judge Zobel. Court Reporter: Debra M. Joyce. * * * (Entered: 11/29/2004) |
| 11/29/2004 | 314 | MOTION for special verdict by Plaintiff Lessee-Dealers Francis Marcoux et al. (Johnson, Jay) (Entered: 11/30/2004) |

| DATE | No. | PROCEEDINGS |
|---|---|---|
| 11/29/2004 | | Electronic Clerk's Notes for proceedings held before Judge Rya W. Zobel: Jury Trial Day Nine held on 11/29/2004; e[x]pert witness Bernard continued cross; plaintiff witness #15 Stephen Pisarczyk; direct; cross; redirect; recross; video deposition of Hanson; witness #17 direct; cross; (Court Reporter [ ]Shelley.) (Urso, Lisa) (Entered: 12/01/2004) |
| 11/30/2004 | 315 | TRANSCRIPT of Jury Trial Day One held on November 15, 2004 before Judge Zobel. Court Reporter: Richard H. Romanow. * * * (Entered: 11/30/2004) |
| 11/30/2004 | 316 | TRANSCRIPT of Jury Trial Day Two held on November 16, 2004 before Judge Zobel. Court Reporter: Richard H. Romanow. * * * (Entered: 11/30/2004) |
| 11/30/2004 | 317 | TRANSCRIPT of Jury Trial Day Nine held on November 29, 2004 before Judge Zobel. Court Reporter: Shelly M. Killian. * * * (Entered: 11/30/2004) |
| 11/30/2004 | | Electronic Clerk's Notes for proceedings held before Judge Rya W. Zobel: Jury Trial Day Ten held on 11/30/2004; continued cross of Brian Gorin; redirect; re-cross; defendant witness #1 Professor Joseph P. Kalt; direct; cross; (Court Reporter Shelley.) (Urso, Lisa) (Entered: 12/01/2004) |

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| DATE | No. | PROCEEDINGS |
|---|---|---|
| 12/01/2004 | | Electronic Clerk's Notes for proceedings held before Judge Rya W. Zobel: Jury Trial Day Eleven held on 12/1/2004; con[t]inued cross of Prof. Kalt; re-direct; re-cross; defendant witness #2 [ ]Alyn Hanson; direct; cross; witness #3 Robert Morris; direct; cross; re-direct; re-cross; witness #4 Michael T. Hanley; direct; (Court Reporter Shelley.) (Urso, Lisa) (Entered: 12/01/2004) |
| | | * * * * * |
| 12/02/2004 | 322 | MOTION for Judgment as a Matter of Law by Motiva Enterprise[s], Shell Oil Company, Shell Oil Products Company. (Johnson, Jay) (Entered: 12/03/2004) |
| 12/02/2004 | 323 | MEMORANDUM in Support re 322 MOTION for Judgment as a Matter of Law filed by Motiva Enterprise[s], Shell Oil Company, Shell Oil Products Company. (Johnson, Jay) (Entered: 12/03/2004) |
| 12/02/2004 | | [E]lectronic Clerk's Notes for proceedings held before Judge Rya W. Zobel: Jury Trial day 12 held on 12/2/2004. Defendant witness #4 Michael Hanley; direct contin[u]ed; cross; redirect; recross; witness #5 direct; cross; redirect; recross; witness #6 Lee Fry; direct; cross; redirect; recross; witness #7 Timothy Brooks; direct; cross; redirect; recross; witness #8 Dennis Nielsen; direct; |

| DATE | No. | PROCEEDINGS |
|---|---|---|
| | | cross; witness #7 (expert) John Umbeck; direct; (Court Reporter Shelley.) (Urso, Lisa) (Entered: 12/06/2004) |
| | | * * * * * |
| 12/03/2004 | 321 | TRANSCRIPT of Jury Trial Day Six held on November 22, 2004 before Judge Zobel. Court Reporter: Valerie A. O'Hara. * * * (Entered: 12/03/2004) |
| 12/03/2004 | | [E]lectronic Clerk's Notes for proceedings held before Judge Rya W. Zobel: Jury Trial Day 13 held on 12/3/2004. [D]efendant witness #9 Umbeck; continued; cross; redirect; recross; witness #10 Webster Collins; direct; cross; redirect; re[ ]cross; witness #11 Howard Gordon; direct; cross; redirect; recross; witness #12 Steve Bradley; direct; cross; redirect; recross; (Court Reporter Shelley.) (Urso, Lisa) (Entered: 12/06/2004) |
| 12/03/2004 | 325 | Plaintiff Lessee-Dealers Proposed Jury Instructions by Francis Marcoux et al. (Johnson, Jay) Modified on 12/8/2004 (Johnson, Jay). (Entered: 12/07/2004) |
| 12/03/2004 | 326 | AMENDED DOCUMENT by Francis Marcoux et al. (Special Verdict). (Johnson, Jay) (Entered: 12/07/2004) |
| 12/03/2004 | 350 | MOTION for special verdict by Shell Oil Products Company, Motiva Enterprise[s], Shell Oil Company. (filed in open court 12/3/04) (Johnson, Jay) (En- |

| DATE | No. | PROCEEDINGS |
|---|---|---|
| | | tered: 02/16/2005) |
| 12/03/2004 | 351 | MOTION for jury instructions by Shell Oil Products Company, Motiva Enterprise[s], Shell Oil Company. (Johnson, Jay) (Entered: 02/16/2005) |
| 12/06/2004 | 324 | TRANSCRIPT of Jury Trial Day Twelve held on December 2, 2004 before Judge Zobel. Court Reporter: Lee A. Marzilli. * * * (Entered: 12/06/2004) |
| 12/06/2004 | 329 | SUPPLEMENTAL MOTION for Special Verdict by Motiva Enterprise[s], Shell Oil Company, Shell Oil Products Company. (Johnson, Jay) (Entered: 12/07/2004) |
| | | * * * * * |
| 12/06/2004 | 332 | Proposed Supplemental and Amended Jury Instructions by Motiva Enterprise[s], Shell Oil Company, Shell Oil Products Company. (Johnson, Jay) (Entered: 12/07/2004) |
| 12/07/2004 | 333 | Trial Exhibit List by Motiva Enterprise[s], Shell Oil Company, Shell Oil Products Company. (Johnson, Jay) (Entered: 12/08/2004) |
| | | * * * * * |
| 12/08/2004 | 335 | SPECIAL JURY VERDICT in favor of plaintiffs against defendant. (Urso, Lisa) Modified on 12/13/2004 (Johnson, Jay). (Entered: 12/10/2004) |

| DATE | No. | PROCEEDINGS |
|---|---|---|
| 12/14/2004 | 336 | TRANSCRIPT of Jury Trial Day Fifteen held on December 8, 2004 before Judge Zobel. Court Reporter: Shelly M. Killian. * * * (Entered: 12/14/2004) |
| 01/07/2005 | 341 | MOTION for Permanent Injunction by Francis Marcoux et al. (Johnson, Jay) (Entered: 01/11/2005) |
| 01/07/2005 | 343 | Proposed Findings of Fact and Rulings of Law on Count 3 by Francis Marcoux et al. (Attachments: #1 part 2) (Johnson, Jay) (Entered: 01/11/2005) |
| 01/10/2005 | 337 | TRANSCRIPT of Jury Trial Day Eleven held on December 1, 2004 before Judge Zobel. Court Reporter: Shelly M. Killian. * * * (Entered: 01/10/2005) |
| 01/10/2005 | 338 | TRANSCRIPT of Jury Trial Day Thirteen held on December 3, 2004 before Judge Zobel. Court Reporter: Shelly M. Killian. * * * (Entered: 01/10/2005) |
| 01/10/2005 | 339 | TRANSCRIPT of Jury Trial Day Fourteen held on December 7, 2004 before Judge Zobel. Court Reporter: Shelly M. Killian. * * * (Entered: 01/10/2005) |
| 01/10/2005 | 340 | EXCERPT TRANSCRIPT of Jury Trial Day Fourteen (Jury Instructions) held on December 7, 2004 before Judge Zobel. Court Reporter: Shelly M. Killian. * * * (Entered: 01/10/2005) |
| 01/10/2005 | 342 | MOTION for an award of punitive damages arising from defendants['] willful disregard of the PMPA by Francis Mar- |

| DATE | No. | PROCEEDINGS |
|---|---|---|
| | | coux et al. (Johnson, Jay) (Entered: 01/11/2005) |
| | | * * * * * |
| 01/28/2005 | 345 | STIPULATION of Dismissal by Stephen Shea and Reading Shell. (Johnson, Jay) (Entered: 02/01/2005) |
| 02/07/2005 | 346 | Proposed Findings of Fact and Rulings of Law by Shell Oil Products Company, Motiva Enterprise[s], Shell Oil Company. (Attachments: #1) (Johnson, Jay) Additional attachment(s) added on 2/9/2005 (Johnson, Jay). Additional attachment(s) added on 2/9/2005 (Johnson, Jay). (Entered: 02/08/2005) |
| 02/07/2005 | 347 | MEMORANDUM in Opposition re 341 MOTION for Permanent Injunction filed by Shell Oil Products Company, Motiva Enterprise[s], Shell Oil Company. (Johnson, Jay) (Entered: 02/08/2005) |
| 02/07/2005 | 348 | MEMORANDUM in Opposition re 342 MOTION [for] an award of punitive damages arising from defendants['] willful disregard of the PMPA filed by Shell Oil Products Company, Motiva Enterprise[s], Shell Oil Company. (Johnson, Jay) (Entered: 02/08/2005) |
| 02/07/2005 | 349 | Response by Shell Oil Products Company, Motiva Enterprise[s], Shell Oil Company to 343 Proposed Findings of Fact. (Attachments: #1) (Johnson, Jay) |

| DATE | No. | PROCEEDINGS |
|---|---|---|
| | | (Entered: 02/08/2005) |
| | | * * * * * |
| 02/28/2005 | 352 | MOTION for Judgment as a Matter of Law, or in the alternative MOTION for New Trial by Shell Oil Products Company, Motiva Enterprise[s], Shell Oil Company. (Johnson, Jay) (Entered: 03/02/2005) |
| 02/28/2005 | 353 | MOTION for Leave to File Memorandum in Excess of 20 pages by Shell Oil Products Company, Motiva Enterprise[s], Shell Oil Company. (Johnson, Jay) (Entered: 03/02/2005) |
| | | * * * * * |
| 03/04/2005 | 355 | REPLY to Response to Motion re 341 MOTION for Permanent Injunction filed by Jordan Avramidis. (Urso, Lisa) (Entered: 03/04/2005) |
| | | * * * * * |
| 04/05/2005 | 361 | (Assented to) MOTION for Leave to File Brief in Excess of 20 Pages by Jordan Avramidis [et al.]. (Attachments: #1 Memorandum in Opposition to Defendants['] Motion for Judgment as a Matter of Law or [i]n the Alternative for a New Trial) (Johnson, Jay) (Entered: 04/06/2005) |
| | | * * * * * |

| DATE | No. | PROCEEDINGS |
|---|---|---|
| 04/28/2005 | 364 | REPLY to Response to Motion re 352 MOTION for Judgment as a Matter of Law MOTION for New Trial filed by Shell Oil Products Company, Motiva Enterprise[s], Shell Oil Company. (Attachments: #1 Exhibit 1) (Sanson, Paul) (Entered: 04/28/2005) |
| 04/28/2005 | 365 | Assented to MOTION for Leave to File *Reply to Plaintiffs' Opposition to Defendants' Motion for Judgment as a Matter of Law or, in the Alternative, For a New Trial* by Shell Oil Products Company, Motiva Enterprise[s], Shell Oil Company. (Sanson, Paul) (Entered: 04/28/2005) |
| | | * * * * * |
| 09/19/2005 | 367 | Judge Rya W. Zobel: ORDER entered denying 296 Motion for Reconsideration, denying 297 Motion for Reconsideration, denying 298 Motion in Limine, denying 299 Motion in Limine, denying 302 Motion in Limine, granting 314 Motion, denying 322 Motion for Judgment as a Matter of Law, granting 329 Motion, denying 341 Motion for Permanent Injunction, denying 342 Motion, granting 350 Motion, granting in part and denying in part 351 Motion, denying 352 Motion for Judgment as a Matter of Law, denying 352 Motion for New Trial, granting 353 Motion for Leave to File, granting 361 Motion for Leave to File, granting 365 |

| DATE | No. | PROCEEDINGS |
|---|---|---|
| | | Motion for Leave to File (Urso, Lisa) (Entered: 09/19/2005) |
| | | * * * * * |
| 10/17/2005 | 369 | NOTICE OF APPEAL as to 367 Order on Motion for Reconsideration, Order on Motion in Limine, Order on Motion for Miscellaneous Relief, Order on Motion for Judgment as a Matter of Law, Order on Motion for Permanent Injunction, Order on Motion for New Trial, Order on Motion for Leave to File, by Shell Oil Products Company, Motiva Enterprise[s], Shell Oil Company. $255 * * * (Entered: 10/19/2005) |
| | | * * * * * |
| 10/18/2005 | 371 | NOTICE OF APPEAL as to 367 Order on Motion for Reconsideration, Order on Motion in Limine, Order on Motion for Miscellaneous Relief, Order on Motion for Judgment as a Matter of Law, Order on Motion for Permanent Injunction, Order on Motion for New Trial, Order on Motion for Leave to File, by Mac's Shell Service, Inc., Jordan Avramidis, Cynthia Karol, Steph[e]n Pisarc[z]yk. $255 * * * (Entered: 10/21/2005) |
| | | * * * * * |
| 12/05/2005 | 377 | USCA Case Number 05-2770 for 371 Notice of Appeal, filed by Jordan Avramidis, Cynthia Karol, Steph[e]n Pis- |

| DATE | No. | PROCEEDINGS |
|---|---|---|
| | | arc[z]yk, Mac's Shell Service, Inc., (Ramos, Jeanette) (Entered: 12/05/2005) |
| 12/07/2005 | 378 | USCA Case Number 05-2771 for 369 Notice of Appeal, filed by Shell Oil Company, Shell Oil Products Company, Motiva Enterprise[s]. (Ramos, Jeanette) (Entered: 12/07/2005) |
| | | * * * * * |
| 01/25/2006 | 382 | Joint MOTION for Entry of separate Judgment under Rule 54(b). (Urso, Lisa) (Entered: 01/25/2006) |
| 02/07/2006 | 383 | TRANSCRIPT of Jury Trial Day Ten held on November 30, 2004 before Judge Zobel. Court Reporter: Shelly M. Killian. * * * (Entered: 02/07/2006) |
| 02/07/2006 | 384 | TRANSCRIPT of Charge Conference held on December 6, 2004 before Judge Zobel. Court Reporter: Shelly M. Killian. * * * (Entered: 02/07/2006) |
| 02/07/2006 | 385 | TRANSCRIPT of Motion Hearing held on May 5, 2005 before Judge Zobel. Court Reporter: Shelly M. Killian. * * * (Entered: 02/07/2006) |
| | | * * * * * |
| 02/16/2006 | 387 | MOTION for Attorney Fees, *Expert Witness Fees, And Costs Pursuant to 15 USC 2805(d)(1)(C) and Fed. R. Civ. P. 54(d)* by Jordan Avramidis, Mac's Shell Service, Inc., Cynthia Karol, Richard |

| DATE | No. | PROCEEDINGS |
|---|---|---|
| | | Melanson, Akma[l] Moawed, Steph[e]n Pisarc[z]yk, Sid Prash[a]d, John Sullivan. (Attachments: * * *) (Farraher, John) (Entered: 02/16/2006) |
| | | * * * * * |
| 08/31/2006 | 397 | Judge Rya W. Zobel: ORDER entered granting 382 Motion for Entry of Judgment under Rule 54(b). The parties shall submit a joint proposed judgment that incorporate[s] the court's rulings. (Urso, Lisa) (Entered: 09/01/2006) |
| 10/26/2006 | 398 | NOTICE by Jordan Avramidis, Shell Oil Products Company, Mac's Shell Service, Inc., Abdul Kafal, Motiva Enterprise[s], Cynthia Karol, Richard Melanson, Akma[l] Moawed, Steph[e]n Pisarc[z]yk, Sid Prash[a]d, John Sullivan, Shell Oil Company re 397 Order on Motion for Entry of Judgment under Rule 54(b) *re: Filing of Revised Proposed Final Judgment* (Attachments: #1 Revised Proposed Judgment and related Exhibit A) (Sanson, Paul) (Entered: 10/26/2006) |
| | | * * * * * |
| 10/27/2006 | 399 | Judge Rya W. Zobel: ORDER entered. JUDGMENT entered. (Urso, Lisa) Additional attachment(s) added on 10/30/2006 (Urso, Lisa). Additional attachment(s) added on 10/31/2006 (Urso, Lisa). (Entered: 10/27/2006) |

| DATE | No. | PROCEEDINGS |
|---|---|---|
| 11/02/2006 | 401 | AMENDED DOCUMENT by Jordan Avramidis, Mac's Shell Service, Inc., Abdul Kafal, Cynthia Karol, Richard Melanson, Akma[l] Moawed, Steph[e]n Pisarc[z]yk, Sid Prash[a]d, John Sullivan. *Amended Notice of Appeal.* (Farraher, John) (Entered: 11/02/2006) |
| 11/10/2006 | 402 | Subsequent NOTICE OF APPEAL by Shell Oil Products Company, Motiva Enterprise[s], Shell Oil Company: *DEFENDANTS' AMENDED NOTICE OF APPEAL.* Filing fee $455. Appeal Record due by 11/30/2006. (Sanson, Paul) (Entered: 11/10/2006) |
| | | * * * * * |
| 12/26/2006 | 406 | Judge Rya W. Zobel: ORDER entered allowing in part 387 Motion for Attorney Fees. Status conference set for January 18, 2007, at 3:00 p.m. (Diblasi, Lily) Modified on 12/27/2006 (Johnson, Jay). (Entered: 12/26/2006) |
| | | * * * * * |
| 01/09/2007 | 407 | SECOND AMENDED NOTICE OF APPEAL by Jordan Avramidis, Mac's Shell Service, Inc., Abdul Kafal, Cynthia Karol, Richard Melanson, Akma[l] Moawed, Steph[e]n Pisarc[z]yk, John Sullivan. (Farraher, John) Modified on 1/10/2007 (Johnson, Jay). (Entered: 01/09/2007) |

| DATE | No. | PROCEEDINGS |
|---|---|---|
| 01/16/2007 | 408 | AMENDED NOTICE OF APPEAL by Shell Oil Products Company, Motiva Enterprise[s], Shell Oil Company. Amendment to 369 Notice of Appeal, 402 Subsequent Notice of Appeal: *Defendants' Second Amended Notice of Appeal.* (Sanson, Paul) Modified on 1/18/2007 (Johnson, Jay). (Entered: 01/16/2007) |
| | | * * * * * |
| 06/21/2007 | 411 | MANDATE of USCA as to 371 Notice of Appeal, filed by Mac's Shell Service, Inc., Cynthia Karol, Jordan Avramidis, Steph[e]n Pisarc[z]yk. Upon consideration of the parties' stipulation of dismissal, it is hereby ordered that this appeal be voluntarily dismissed pursuant to Fed. R. App. P. 42(b) with each party to bear its own costs. This dismissal does not affect No. 05-2771, which remains open. Mandate issued in the USCA 6/21/2007 (Ramos, Jeanette) (Entered: 06/21/2007) |
| | | * * * * * |
| 04/21/2008 | 413 | USCA Judgment as to 402 Subsequent Notice of Appeal filed by Shell Oil Products Company, Shell Oil Company, Motiva Enterprise[s], 369 Notice of Appeal, filed by Shell Oil Products Company, Shell Oil Company, Motiva Enterprise[s]. Upon considerati[o]n whereof, it is now here ordered, adjudged and decreed |

| DATE | No. | PROCEEDINGS |
|---|---|---|
| | | as follows: The judgment of the district court on the state contract claims, the unreasonable gasoline pricing claims, and the constructive termination claims is affirmed. The judgment on the constructive nonrenewal claims is reversed. The jury award of attorney's fees and costs is vacated and remanded for reconsideration in light of our mixed disposition of the claims under the Petroleum Marketing [Practices Act]. Costs on appeal are awarded to the appellees. Judgment issued in the USCA 4/18/2008 (Ramos, Jeanette) (Entered: 04/21/2008) |
| 04/21/2008 | 414 | OPINION of USCA. Opinion issued in the USCA 4/18/2008 (Attachments: #1 part 2) (Ramos, Jeanette) (Entered: 04/21/2008) |
| | | * * * * * |
| 06/09/2008 | 415 | MANDATE of USCA as to 402 Subsequent Notice of Appeal filed by Shell Oil Products Company, Shell Oil Company, Motiva Enterprise[s], 369 Notice of Appeal, filed by Shell Oil Products Company, Shell Oil Company, Motiva Enterprise. Mandate issued in the USCA 6/6/2008 (Ramos, Jeanette) (Entered: 06/09/2008) |
| | | * * * * * |

| DATE | No. | PROCEEDINGS |
|---|---|---|
| 06/20/2008 | 418 | Judge Rya W. Zobel: ORDER entered. (Jury Trial set for 11/17-11/21 @09:00 AM in Courtroom 12 before Judge Rya W. Zobel; 12/8-12/12; 12/15-12/19; Pre-trial Conference set for 11/5/2008 02:00 PM in Courtroom 12 before Judge Rya W. Zobel.) (Urso, Lisa) (Entered: 06/20/2008) |
| | | * * * * * |
| 08/07/2008 | 425 | Judge Rya W. Zobel: ORDER entered. The discovery and trials will proceed on the basis of the First Circuit ruling. (Urso, Lisa) (Entered: 08/07/2008) |
| | | * * * * * |
| 10/27/2008 | | Electronic Clerk's Notes for proceedings held before Judge Rya W. Zobel: Telephone Conference held on 10/27/2008. Case has settled; defendant to file a proposed show cause hearing for Abe Abrahams for 11/19/08 at 2:00 p.m.; motion to be filed for Joe Kelleher to dismiss; 1st group not a party to the settlement; sealed settlement; Court to get back to counsel re: NH & RI cases; (Attorneys present: Farraher & Sanson) (Urso, Lisa) (Entered: 10/27/2008) |
| 10/27/2008 | 468 | Judge Rya W. Zobel: ORDER entered. Accordingly, the court will notify the Clerk of the Panel of the filing of the parties['] stipulation of dismissal and |

| DATE | No. | PROCEEDINGS |
|---|---|---|
| | | thereby resolve the transfer order. (Urso, Lisa) (Entered: 10/27/2008) |
| | | * * * * * |
| 11/13/2008 | 471 | STIPULATION of Dismissal *(STIPULATION OF PARTIAL DISMISSAL IN C.A. No. 01-11300)* by Chriss Azazian, Richard Baima, Ed Baker, Steve Black, Douglass Chapman, James Coggeshall, Michael Corbett, Patricia Dasilva, Alex Dasilva, Francis Marcoux, Steve Falcone, George Fontaine, Bill Fontaine, Camille Francis, Steve Frangias, Matty Gaeta, Donald Gagnon, John Generoso, John Golden, Kal Hamze, Shell Oil Product[ ]s Company, Abraham Hamze, Tibor Hangyal, JES Service, Inc., Patrick Hines, Adam Hipp, Muhammad Imatiaz, Jay Jon, Kay Jon, Abdul Kafal, Jaque Kanaan, George Kantarges, Motiva Enterprise[s], Jim Kantarowski, William Kaufman, Hussein Kobessi, Mike Lamarche, James Moraidis, Sunny Patel, Ronnie Aboud, Constantin Peides, Russell Picard, Paul Richards, Harvy Rudnick, Fred Saad, Aziz Saba, Walid Samrout, Earl Stickney, Thomas Sullivan, Roger Thibault, Dimitrious Tsanikilides, Toufic Atallah, Dror Dusdushman, Earl McLaughlin, Stephen Shea, Wilson Tiburtino, J. Enterprise, Inc., Mahendrs Amin, Lasco Enterprise, Inc., Nikolas Manousaridis, |

| DATE | No. | PROCEEDINGS |
|---|---|---|
| | | Larry Rubensein, Paul Sroczynski, Shell Oil Company, Massound Atalish, Mike Atalish. (Sanson, Paul) (Entered: 11/13/2008) |
| | | * * * * * |
| 11/19/2008 | 476 | Judge Rya W. Zobel: ORDER entered. JUDGMENT entered dismissing Mr. Abraham's claims against Shell with prejudice and without costs to either party. (Urso, Lisa) (Entered: 11/19/2008) |
| | | * * * * * |

# UNITED STATES COURT OF APPEALS
# FOR THE FIRST CIRCUIT

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Docket No. 05-2770

---

FRANCIS MARCOUX, *ET AL.*,
*Plaintiffs*,

MAC'S SHELL SERVICE, INC.; CYNTHIA KAROL; JOHN A. SULLIVAN; AKMAL, INC.; SID PRASHAD; RAM CORPORATION, INC.; J&M AVRAMIDIS, INC.; THREE K'S, INC.; STEPHEN PISARCZYK,
*Plaintiffs-Appellants*,

v.

SHELL OIL PRODUCTS COMPANY, LLC; MOTIVA ENTERPRISES, LLC; SHELL OIL COMPANY,
*Defendants-Appellees*.

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## RELEVANT DOCKET ENTRIES

| DATE | PROCEEDINGS |
|---|---|
| 11/30/2005 | CIVIL CASE docketed. Opening forms sent. Notice of Appeal filed by Appellants Cynthia Karol, Sid Prash[a]d, John B. Sullivan, Mac's Shell, RAM Corp., J&M Avramidis, Inc., Akmal, Inc., Three K's, Inc., Stephen Pisarc[zy]k. Appearance form due 12/14/05. Docketing Statement due 12/14/05. Transcript Report/Order due 12/14/05. [05-2770] (JC) |

| DATE | PROCEEDINGS |
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* * * * *

| | |
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| 06/21/2007 | JUDGMENT entered: Upon consideration of the parties' stipulation of dismissal, it is hereby ordered that this appeal be voluntarily dismissed pursuant to Fed. R. App. P. 42(b) with each party to bear its own costs. This dismissal does not affect Appeal No. 05-2771, which remains open. Mandate to issue forthwith. [1259530- 1] [05-2770] (JC) |
| 06/21/2007 | MANDATE ISSUED. [05-2770] (JC) |

**UNITED STATES COURT OF APPEALS**
**FOR THE FIRST CIRCUIT**

---

Docket No. 05-2771

---

FRANCIS MARCOUX, *ET AL.*,
*Plaintiffs*,

CYNTHIA KAROL; SID P[RA]SHAD; JOHN A. SULLIVAN; MAC'S SHELL SERVICE, INC.; RAM CORPORATION, INC.; J&M AVRAMIDIS, INC.; AKMAL, INC.; THREE K'S, INC.; STEPHEN PISARCZYK,
*Plaintiffs-Appellees*,

V.

SHELL OIL PRODUCTS COMPANY, LLC; MOTIVA ENTERPRISES, LLC; SHELL OIL COMPANY,
*Defendants-Appellants*.

---

**RELEVANT DOCKET ENTRIES**

| DATE | PROCEEDINGS |
|---|---|
| 12/02/2005 | CIVIL CASE docketed. Opening forms sent. Notice of Appeal filed by Appellants Shell Oil Products, Motiva Enterprises and Shell Oil Company. Appearance form due 12/16/05. Docketing Statement due 12/16/05. Transcript Report/Order due 12/16/05. [05-2771] (JC) |
| 12/02/2005 | RECORD filed: 1 volume consisting of docket entries 369 and 371 (filed in 05-2770). No transcripts filed. [1065048-1] [05-2771] (JC) |

| DATE | PROCEEDINGS |
|---|---|

* * * * *

01/03/2006 ORDER entered: The parties have filed cross-appeals in Civil Action No. 01-11300 (D. Mass). Pursuant to Fed. R. App. P. 28.1, it is hereby ordered that the above-named defendants be deemed the appellants/cross-appellees (?appellants?) and that the above-named plaintiffs be deemed the appellees/cross-appellants (?appellees?). The parties are directed to use the above caption on all future filings related to these cases. A briefing schedule will be set once the record on appeal, including all necessary transcripts, is complete and the stay is lifted. The attached information sheet sets forth the filing requirements for briefs filed pursuant to Fed. R. App. P. 28.1. [05-2770, 05-2771] (JC)

* * * * *

02/09/2006 SUPPLEMENTAL RECORD consisting of USDC transcript #'s: 383-385 filed. [1089331-1] [05-2770, 05-2771] (MC)

02/09/2006 Transcripts of #383: Jury Trial (day 10), 11/30/04; #384: Charge Conference, 12/6/04; #385: Trial, 5/5/05 filed by court reporter Shelly Killian in 05-2770 & 05-2771. [05-2770, 05-2771] (MC)

* * * * *

12/01/2006 SUPPLEMENTAL RECORD consisting of docket entries 399 and 402 filed. [1191380-1] [05-2771, 05-2770] (JC)

| DATE | PROCEEDINGS |
|---|---|

* * * * *

12/06/2006 Amended Notice of Appeal filed. Dist Ct #: 01-11300 Lead Dist Ct #: 01-11300 Entry Date of Order/Judgment: 10/27/06 Date Amended NOA Filed: 11/10/06 [05-2771] (JC)

12/15/2006 SUPPLEMENTAL RECORD consisting of docket entries 1, 4-10, 12-18, 20, 21, 23-27, 29, 30, 71-73, 76, 78-80, 82-89, 91-95, 97, 98, 106-112, 114-199, 228, 251, 252-260, 315, 316, 317-322, 329-335, 337-381, 387-392, 394-403 [1195816-1] Docket entries 152 and 164 filed under seal. ***FILED WITH 05-2770*** [05-2770, 05-2771] (JC)

12/15/2006 Transcript of November 22-24, 2004 jury trial filed by court reporter Valerie O'Hara. ***FILED IN 05-2770*** [05-2770, 05-2771] (JC)

12/15/2006 Transcript of May 5, 2005 motion hearing; November 17, 18, 19, 29, 2004 December 1, 3, 7 and 8, 2004 jury trial filed by court reporter Shelly Killian. ***FILED IN 05-2770*** [05-2770, 05-2771] (JC)

12/15/2006 Transcript of November 15, 16, 2004 trial filed by court reporter Richard Romanow. ***FILED IN 05-2770*** [05-2770, 05-2771] (JC)

* * * * *

02/15/2007 SUPPLEMENTAL RECORD consisting of docket entries 407 & 408 filed. [1215763-1] [05-2770, 05-2771] (JC)

| DATE | PROCEEDINGS |
|---|---|
| 02/15/2007 | Amended Notice of Appeal filed. Dist Ct #: 01-11300 Lead Dist Ct #: 01-11300 Entry Date of Order/Judgment: 12/8/04, 12/10/04, 9/19/05, 8/31/06, 10/27/06 and 12/26/06. Date Amended NOA Filed: 1/16/07 [05-2771] (JC) |
| 02/15/2007 | Amended Notice of Appeal filed. Dist Ct #: 01-11300 Lead Dist Ct #: 01-11300 Entry Date of Order/Judgment: 12/8/04, 9/19/05, 8/31/06 and 10/27/06 Date Amended NOA Filed: 11/10/06 [05-2771] (JC) |
| | * * * * * |
| 04/10/2007 | BRIEF filed by Appellants Shell Oil Products, Shell Oil Company and Motiva Enterprises. Length: 86 pages, 18,647 words, Copies: 9, delivered by hand. Certificate of service date 4/9/07. [1235391-1] Appellee brief due 5/9/07 [05-2770, 05-2771] (JC) |
| | * * * * * |
| 04/10/2007 | JOINT APPENDIX filed. Copies: 5. Volumes: XI. Delivered by hand. Certificate of service date 4/9/07 [1237526-1] [05-2770, 05-2771] (JC) |
| 04/12/2007 | SUPPLEMENTAL RECORD consisting of trial exhibits filed. [1236595-1] [05-2770, 05-2771] **Filed in the exhibit room** (JC) |
| | * * * * * |
| 06/01/2007 | PUBLIC NOTE: Motion for voluntary dismissal of cross-appeal filed in 05-2770. [05-2771] (JC) |

| DATE | PROCEEDINGS |
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* * * * *

06/11/2007 SUPPLEMENTAL APPENDIX filed by the appellees. Copies: 5. Volumes: 1. Delivered by mail. Certificate of service date 5/30/07 [1255670-1] [05- 2770, 05-2771] (JC)

* * * * *

06/21/2007 BRIEF filed by Appellees Cynthia Karol, Steph[e]n Pisarc[z]yk, Sid Prash[a]d, John Sullivan, Mac's Shell, RAM Corp., J&M Avram[ ]idis, Inc., Akmal, Inc., Three K's, Inc. and Stephen Pisarc[zy]k. Length: 18,972 words, 80 pages, Copies: 10, delivered by mail. Certificate of service date 5/30/07. [1259568-1] Reply brief due 7/9/07. Reply brief deadline set from date appellees' brief was docketed. [05-2771] (JC)

* * * * *

06/21/2007 MOTION filed by Movant BP Products North America Inc. for leave to file amicus curiae brief and appendix in support of appellants and to accept amicus curiae brief instanter. Certificate of service dated 6/20/07, by mail. [05-2771] (JC)

* * * * *

07/06/2007 ORDER entered by Judge Kermit V. Lipez: BP Products' motion to file an amicus brief and appendix is provisionally granted. Plaintiffs may respond to the amicus brief in a supplemental appellee brief, not to exceed

| DATE | PROCEEDINGS |
|---|---|
| | 5000 words, to be filed within two weeks of the date of this order. In provisionally allowing the amicus brief to be filed, we do not now decide whether the amicus is impermissibly presenting a new argument on appeal, but rather leave that matter to the panel that will eventually decide the appeal. [05-2771] (JC) |
| 07/06/2007 | BRIEF filed by Amicus Curiae BP Products in 05-2771 in support of Appellants. Length: 23 pages, 5,656 words, Copies: 10, delivered by mail. Certificate of service date 6/20/07. [1264315-1] [05-2771] (JC) |
| 07/06/2007 | APPENDIX filed by Amicus Curiae BP Products. Copies: 5. Volumes: 1. Delivered by mail. Certificate of service date 6/20/07 [1264316-1] [05- 2771 ] (JC) |
| 07/10/2007 | REPLY BRIEF filed by Appellant[s] Shell Oil Products in 05-2771, Motiva Enterprises in 05-2771, Shell Oil Company in 05-2771. Length: 40 pages (8,933 words), Copies: 10, delivered by mail. Certificate of service date 7/9/07. [1265383-1] [05-2771] (RL) |
| | * * * * * |
| 07/20/2007 | OPPOSITION to BP Products North America, Inc's Amicus brief filed by Appellees Cynthia Karol, Steph[e]n Pisarc[z]yk, Sid Prash[a]d, John B. Sullivan, Mac's Shell, RAM Corp., J&M Avram[ ]idis, Inc., Akmal, Inc., Three K's, Inc. and Stephen Pisarc[zy]k. Certificate of service dated 7/20/07, by Federal Express. [1269388-1] [05-2771] (JC) |

| DATE | PROCEEDINGS |
|---|---|

* * * * *

09/07/2007 SUPPLEMENTAL APPENDIX filed by Appellants Shell Oil Products, Motiva Enterprises and Shell Oil Company. Copies: 5. Volumes: 1. Delivered by mail. Certificate of service date 7/9/07. Provisionally filed NOT under seal per order of this date. [1285272-1] [05-2771] (JC)

09/07/2007 REPLY BRIEF filed by Amicus Curiae BP Products in 05-2771. Length: 6 pages, Copies: 10, Served by mail. Certificate of service date 8/9/07. [1285273-1] [05-2771] (JC)

09/07/2007 MOTION filed by Appellees Cynthia Karol, Steph[e]n Pisarc[z]yk, Sid Prash[a]d, John B. Sullivan, Mac's Shell, RAM Corp., J&M Avram[ ]idis, Inc., Akmal, Inc., Three K's, Inc. and Stephen Pisarc[zy]k to file sur-reply brief. Certificate of service dated 9/7/07, by Federal Express. [05-2771] (JC)

09/07/2007 PLEADING TENDERED: Sur-reply brief, filed by John F. Farraher for plaintiff-appellees. [1285524-1] Certificate of service date 9/7/07 [05-2771] (JC)

09/14/2007 CASE ARGUED 9/14/07. Torruella, Howard, Delgado-Colon, JJ. Paul D. Sanson for Appellant Shell Oil Company, Appellant Motiva Enterprises, Appellant Shell Oil Products. John F. Farraher for Appellee Stephen Pisarc[zy]k, Appellee Three K's, Inc., Appellee Akmal, Inc., Appellee J&M Avram[ ]idis, Inc., Appellee RAM Corp., Appellee Mac's

| DATE | PROCEEDINGS |
|---|---|
| | Shell, Appellee John B. Sullivan, Appellee Sid Prash[a]d, Appellee Steph[e]n Pisarc[z]yk, Appellee Cynthia Karol (KT) |
| | * * * * * |
| 04/18/2008 | OPINION issued by Juan R. Torruella, Appellate Judge; Jeffrey R. Howard, Appellate Judge and Aida M. Delgado-Colon, U.S. District Judge. Published. [05-2771] (MH) |
| 04/18/2008 | JUDGMENT entered by Juan R. Torruella, Appellate Judge; Jeffrey R. Howard, Appellate Judge and Aida M. Delgado-Colon, U.S. District Judge. 05-2771 Affirmed/Reversed [05-2771] (MH) |
| 04/25/2008 | MOTION filed by Appellees Akmal, Inc., J&M Avram[ ]idis, Inc., Cynthia Karol, Mac's Shell, Steph[e]n Pisarc[z]yk, Stephen Pisarc[zy]k, Sid Prash[a]d, RAM Corp., John B. Sullivan and Three K's, Inc. to clarify opinion (published), [5240803-2]. Certificate of service dated 04/25/2008. [05-2771] (AS) |
| | * * * * * |
| 05/02/2008 | PETITION filed by Appellants Motiva Enterprises, Shell Oil Company and Shell Oil Products Company for rehearing and rehearing en banc. Certificate of service dated 05/02/2008 by FedEx. [05-2771] (AS) |
| | * * * * * |

| DATE | PROCEEDINGS |
|---|---|
| 05/23/2008 | ORDER entered by Michael Boudin, Chief Appellate Judge; Juan R. Torruella, Appellate Judge; Sandra L. Lynch, Appellate Judge; Kermit V. Lipez, Appellate Judge; Jeffrey R. Howard, Appellate Judge and Aida M. Delgado-Colon, U.S. District Judge denying petition for rehearing and rehearing en banc filed by Appellants Motiva Enterprises, Shell Oil Products Company and Shell Oil Company. [05-2771] (AS) |
| 06/05/2008 | ERRATA sheet to opinion (published) filed. [05-2771] (SBT) |
| 06/06/2008 | MANDATE Issued. [05-2771] (CP) |
| | * * * * * |
| 06/19/2008 | ORDER entered by Juan R. Torruella, Appellate Judge; Jeffrey R. Howard, Appellate Judge and Aida M. Delgado-Colon, U.S. District Judge of the District of Puerto Rico, sitting by designation on motion to clarify order filed by Appellees Steph[e]n Pisarc[z]yk, Akmal, Inc., Three K's, Inc., Stephen Pisarc[zy]k, Mac's Shell, J&M Avram[ ]idis, Inc., Cynthia Karol, John B. Sullivan, Sid Prash[a]d and RAM Corp. [05-2771] (AS) |
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**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MASSACHUSETTS**

| | | |
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| FRANCIS MARCOUX, et al[ ]., | ) | |
| | ) | [FILED |
| Plaintiffs, | ) | JUL 27 '01] |
| vs. | ) | |
| | ) | C.A. No.: |
| SHELL OIL PRODUCTS | ) | 01-11300 RWZ |
| COMPANY, INC., and | ) | |
| MOTIVA ENTERPRISES, LLC, | ) | |
| | ) | |
| Defendants | ) | |

**COMPLAINT AND JURY DEMAND**

**INTRODUCTION**

1. In response to the ruling in Civil Action number 00-11295-RWZ, the plaintiffs in the above-captioned matter are the franchisees and members of the Shell Dealers Legal Defense Group, which is the name of an unincorporated association of Shell gasoline station dealers that was originally named as a plaintiff. The Court ruled that the Shell Dealers Defense Group lacked standing. Thus, this action is being filed in the name of the individual franchisees, rather than that of the Shell Dealers Defense Group.

2. The filing of this action was necessitated by the actions of the defendants, including those of the Shell Oil Company, and the entities formed as a result of its "Alliance" with Texaco, Motiva Enterprises, LLC, Equiva Services LLC, and Equiva Trading Co., LLC; which have inflicted harm upon the Plaintiffs, including irreparable harm such as harm to the dealer Plaintiff's business

goodwill and reputations, and loss or threatened loss of the businesses of the dealer Plaintiffs, the latter being Shell branded franchised retailers throughout the Commonwealth. At a time when gasoline prices command national headlines, and Shell itself has stated that it is "awash in a Niagara Falls of cash"; Shell retailers are suffering from a decline in their business viability, as *approved by management at the highest levels of the Defendants. The Defendants had studies done known as the "Mercer Studies"; which showed that no retailers in the motor fuel industry were paying the rent levels that the Defendants planned to implement, and that indeed, the retailers would not survive such an implementation.*

Nonetheless they have gone forward [] with the implementation of what they call the "Strategic Marketing Initiative"; which, among other things, is reported to contain information on the displacement of lessee dealers by commission operated and salary operated retail outlets ("CORO" and "SORO").

On a more localized basis, the Defendants have created entities; known as the Regional Planning Units, which in turn developed key document packages known as the "Regional Planning Strategies," all of which were combined into a national master plan known as the Strategic Marketing Initiative. Shell has taken great pains to ensure that the "RPS" documents are not reviewed by anyone, because of the damning content.

At its core, the goal of the Initiative is to seize the value of the billions of dollars of investment, and the millions of hours invested by the plaintiff independent dealers, by raising the dealers[']costs, primarily station rent, and "wholesale" gasoline pricing, in order to insure the replacement of as many independent dealers as possible with a network of stations directly operated and/or con-

trolled by the Defendants, known as salary operated retail outlets (SORO) or commission operated retail outlets (CORO's). Regrettably, the Defendants can engage in this action, at very little cost to themselves, because the Plaintiff Dealers are locked into the stations by reason of their investment, and are contractually precluded from obtaining the exact same gasoline from distributors, at far lower prices. The Dealers must maintain their gasoline volumes by reason of minimum gallonage provisions in their contracts, or face the risk of franchise termination. Moreover, the Dealers are obligated to pay the oppressive new rent, that Shell calls "Program Rent" until such time that this Court declares this "DISENFRANCHISEMENT PROGRAM RENT" illegal or unenforceable.

The only constraint upon the devious plot of the Defendants is the legal and political opposition that can be mounted by the independent dealers in defense of their business; and the ability, or lack thereof, of the Defendants to staff the newly taken over locations. Because federal law, such as the Petroleum Marketing Practices Act, 15 U.S.C. 2801 et seq., prohibits the Defendant franchisors; Shell Oil Company and Motiva Enterprises, LLC; (collectively referred to as "Shell" or "Defendants"), as well as a number of state laws cited herein, prohibits a direct takeover of the dealer locations, Shell seeks to do indirectly, what it cannot do directly.

Shell's wrongful conduct includes, but is not limited to efforts to effectively evict the dealers from their franchised locations, by forcing unreasonable and oppressive franchise provisions upon the franchisees that would make continued operation of the franchises uneconomical, and would allow Shell, Motiva, and Equiva to take over the locations for their own account.

In other cases, Shell has attempted to argue that because they are offering renewal contracts to the dealers, they are not seeking to disenfranchise them. This argument is utterly meritless, and is truly disingenuous: Shell is offering renewals only because the PMPA compels it to, 15 U.S.C. 2802(a); and its argument is analogous to an axe murderer doing an autopsy on its victim, and proclaiming natural causes as the cause of death.

As noted, the primary tool used by this unholy trinity (Shell/Motiva/Equiva) is to increase the franchisees[']costs of doing business, while locking the franchisees into non-negotiable minimum purchase arrangements, and otherwise take unfair advantage of the fact that the dealers are locked into these locations by reason of their investment of time and money into the stations.

There are 4 key pillars to the disenfranchisement scheme: the Strategic Marketing Initiative; Regional Planning Systems, the new wholesale pricing practices reflected in the "MPSI Price Zones"; and application of the "SPEARS" (street back pricing evaluation and response system) in a manner to fix dealer margins at a level where the rent and other Shell/Motiva/Equiva imposed costs cannot be recovered. The actions of the Defendants are even more indefensible in light of the fact that the Shell Dealer Creed drafted by the defendants specifically calls for fair treatment generally; and specifically for a "fair allocation of profits between the retailer and the companies." The Defendants, through their new policies, practices and procedures, have redefined the term "fair" to mean, all for us, nothing for you. Indeed, the new policies are designed to minimize or eliminate dealer incomes.

Specifically, the Defendants[']new policies include (but are not limited to):

(a) using a contractor, MPSI of Tulsa, Oklahoma, to develop new "price zones" or in "Shell speak" price PADS, whereby the dealer locations targeted for conversion to company or commission operation pay a higher price for the same gasoline in the same purchase quantity than other Shell branded locations;

(b) attempting to economically evict the dealers[ ] from their franchised locations by terminating a rent program that has been the cornerstone of Shell's marketing program in place in excess of 16 years, a program known as the "Variable Rent Program"; which the dealers relied upon, and reasonably relied upon at the urging of Shell personnel extending to the highest level of the company.

In lieu of replacing the VRP with an equivalent or comparable program, something it pledged to do in the event the VRP was ever terminated, Shell is in the process of replacing the VRP or VRP substitute with a new oppressive rent program, known as "Program Rent," or charging full "Contract Rent" despite the fact that Shell openly stated [and] knew the dealers could not survive at "Contract Rent" levels.

Under this new rent structure, rents to the plaintiff dealers are universally increasing and increasing dramatically, often in excess of two to four times the rent that the dealers have been subject to since the establishment of their franchises, and in many cases, in excess of the annual profit of the business. It is this very rent program that representatives of Shell have expressly and/or impliedly assured the dealers year after year would never take affect, as Shell has been and remains aware that this oppressive rent structure all but guarantees the failure of all but a few select dealers.

Moreover in implementing the new rent plan, Shell wrote to the dealers that it would base the rents upon indepen-

dent appraisals, performed by a Member of the Appraisal Institute, using his or her best judgment. Instead of honoring this commitment, Shell proceeded to issue limiting instructions to the appraisers; and had them apply upward adjustments to various elements of the appraisal, resulting in a higher base value, which in turn was adjusted upward to ensure that the maximum rent could be extracted from the dealers.

Next, Shell provided a challenge procedure, whereby the dealer would pay for an appraisal under the limiting instructions, from a list of Shell approved appraisers, and thus, purporting to deny the dealer access to appraisals to be performed by other Members of the Appraisal Institute; and again the appraiser would not be allowed to simply apply the Uniform Standards of Professional Appraisal Practice in accordance with his or her best professional judgment: instead Shell insisted that the rules be slanted as it desired; also violating the law;

(c) imposing contract terms that shift costs of doing business such as maintenance of Shell owned property to the dealers; and that purport to illegally shift liability for actions such as increasing use of the controversial additive MTBE in its gasoline to the dealers; in violation of clear statutory prohibitions, or imposing minimum gallonage provisions in spite of statutory prohibitions thereupon,

(d) forcing dealers to offer their franchises for sale or assignment at [ ] fire sale prices, and telling a prospective franchisee that it can take only a worthless trial franchise (15 U.S.C. 2803) which allows Shell to exercise a right of first refusal clause in its contract. For example, plaintiff Kauser paid $350,000 for the rights to his franchise in 1998; and was forced to sell out for $50,000, allowing Shell to rid itself of the franchisee, and now company operate the station.

(e) charging Dealers exorbitant fees for a worthless convenience store franchise known as "ETD" or Experience the Difference; which is more aptly titled, "Emasculate the Dealer"; despite being warned by its consultant, Arthur Andersen, that the program would not produce nearly the results being used to induce the dealers to invest in the program, and actually pulling the core of the program, a software program known as "FMS" out of its company operated stations or the work as promised and

(f) other illegal actions as more fully set forth herein, which include, but are not limited to, [ ] an undisclosed rental charge in the gasoline price charged to the dealers during the time the VRP program was in effect.

The federal franchise law, the Petroleum Marketing Practices Act, 15 U.S.C. 2801, 2805, provides that the law of each dealer[']s home state governs the franchise agreements, and there are a number of Massachusetts state law claims in addition to the claims common to each dealer (breach of contract; breach of covenant of good faith and fair dealing, fraud, promissory and equitable estoppel, Massachusetts General Laws 93A and 93E, and U.C.C. provisions, including the 2-305 open price term provision), that must be applied in this action.

In any event, the key operative fact[ ] is that this action had to be brought because of Shell's decision to cannibalize the goodwill and business created by the Plaintiff dealers, who prior to the creation of Motiva had made Shell the #1 marketer of gasoline in the Country, and led many of these dealers to listen to Shell and oppose federal and state legislation on the basis that "it would cause Shell to cancel the VRP"; at the time that Shell was plotting their demise.

4. Through oppressive new contract terms, and changes to its marketing policies, practices and procedures, Shell

is inflicting ever higher costs of doing business, such as increasing its wholesale price of gasoline, or dealer tank-wagon price, both on an absolute scale and with respect to its competitors, and otherwise seeking to collect additional rent and fees from the dealers, in an effort to implement its dealer elimination scheme.

By virtue of this action, the Dealers seek relief from the new rent scheme, or at a minimum, that Shell live up to its promise to base the rent on the fair market value of the station, used as a service station, and have the value be arrived at by qualified Members of the Appraisal Institute using their best independent judgment; as opposed to being hamstrung by limiting instructions from Shell. In addition to relief from the oppressive franchise terms and practices, Plaintiffs seek actual and punitive damages, as well as statutory damages that may be allowed under the law.

The Dealers also seek to stem other immediate and irreparable harm in the form of a declaratory judgment adjudging the actions of Shell, and the offending provisions of the new franchise agreements to violate [ ] state and federal law.

**JURISDICTION AND VENUE**

2. This complaint[ ] is filed, and proceedings instituted pursuant to the following:

   (a) The Petroleum Marketing Practices Act, 15 U.S.C. 2805, providing for jurisdiction in this Court and venue in this court as well,

   (b) The federal Declaratory Judgment Act, 28 U.S.C. 1331,

   (c) supplemental jurisdiction over the following Massachusetts law claims:

      1. Fraud and Fraudulent Inducement

2. Promissory Estoppel
3. Equitable Estoppel
4. Breach of Contract
5. Breach of Implied Covenant of Good Faith and Fair Dealing

**(B) Statutory Claims Applicable to All Plaintiffs**

1. Breach of U.C.C. 2-103 (express covenant of good faith and fair dealing)
2. Breach of U.C.C. 2-202 (Unconscionability)
3. Breach of U.C.C. 2-305 (breach of open price term provision)

**Massachusetts General Laws**

Mass. Gen. Laws 93A: Unfair Trade Practices Act

93E: Gasoline Dealers Franchises

93: Massachusetts Antitrust Act

3. The Defendants are Delaware corporations, and the amount in controversy exceeds jurisdictional thresholds, therefore federal diversity jurisdiction is present.
4. The Plaintiffs are either Massachusetts corporations, residents of the Commonwealth, or have their principal place of business in the Commonwealth, thus providing for jurisdiction and venue in this Court under 15 U.S.C. 2805, as well as the general statutes.

**PARTIES**

5. The plaintiffs include the following Franchisees:

| Plaintiff | Station Address |
|---|---|
| Ronnie Aboud | 384 Washington Street, Braintree, MA and 1434 Washington Street, Hanover, MA |
| Abraham Abraham | 264 Timpeny Boulevard, Gardner, MA |
| Mahendrs Amin | 181 Main Street, Hudson, MA |

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| Massoud Atalish | 620 Belmont Street, Brockton, MA |
| Mike Atalish | 1525 Smith Street, N. Providence, R.I. |
| Jordan Avramidis | 920 Main Street, Walpole, MA |
| Chriss Azizian | 10 HoJo Plaza, Dorchester, MA |
| Richard Baima | 139 Medway Street, Milford, MA |
| Ed Baker | 875 Highland Avenue, Needham, MA |
| Steve Black | 372 Plymouth Avenue, Fall River, MA |
| Douglas Chapman | 1095 Massachusetts Avenue, Lexington, MA |
| James Coggeshall | 1612 Oak Street, Brockton, MA |
| Michael Corbett | 1 Rutberford Avenue, Charlestown, MA |
| Patricia & Alex Dasilva | 129 Ashley Boulevard, New Bedford, MA |
| Steve Falcone | 712 Southbridge Street, Auburn, MA |
| George Fontaine | 890 S. Washington Street, N., Attleboro, MA |
| Bill Fontaine | 461 E. Washington Street, N., Attleboro, MA |
| Camille Francis | 138 Haverhill Street, Methuen, MA |
| Steve Frangias | 249 Main Street, Stoneham, MA |
| Matty Gaeta | 14 Newbury Street, Peabody, MA |
| Donald Gagnon | 535 Lynnway, Lynn, MA |
| John Generoso | 511 Totten Pond Road, Waltham, MA |
| Joe Golden | 612 Oak Street, Brockton, MA |
| Kal Hamze | 111 North Street, Salem, MA and 987 Worchester Road, Wellesley, MA |
| Kal and Abraham Hamze | 1100 Lakeview, Dracut, MA |
| Tibor Hangyal | 201 Magazine Street, Cambridge, MA |
| Patrick Hines | 1072 GAR Highway, Route 6, Somerset, MA |
| Adam Hipp | 446 Station Avenue, S. Yarmouth, MA |
| Muhammad Imtiaz | 189 Chelmsford Street, Chelmsford, MA and 431 Lincoln, MA |
| Jay & Kay Jon | 520 Broadway, Revere, MA |
| Abdul Kafal | 351 Bridge Street, Somerville, MA |
| Jacque Kanaan | 27 Bridge St. Weymouth, MA |
| George Kantarges | 26 Ocean Street, Dedham, MA |
| Jim Kantarowski | 2128 Ocean Street, Marshfield, MA |
| Cynthia Karol | 182 Pleasant Street, Attleboro, MA |

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|---|---|
| William Kaufman | 281 Orchard Street, Watertown, MA |
| Joe Kelleher | 82 River Street, Dorchester, MA |
| Hussein Kobessi | 280 Southbridge Street, Auburn, MA |
| Hussein Kobessi | 747 Plantation Station, Worchester, MA |
| Mike Lamarche | 436 Lancaster Street, Leominster, MA |
| Francis Marcoux | 135 East Main Street, Southbridge, MA<br>123 East Main Street, Webster, MA |
| Richard Melanson | 904 Main Street, Southbridge, MA |
| Akmal Moawed | 302 W. Broadway, South Boston, MA |
| James Moraidis | 962 Main Street, Waltham, MA |
| Sunny Patel | 155 Providence Boulevard, N.,<br>Chelmsford, MA |
| Constantin Peides | 394 Providence Highway, Westborough, MA |
| Russell Picard | 128 Turnpike Road, Westborough, MA |
| Stephan Pisarcyk | 114 Boylston Street, W. Boylston, MA |
| Sid Prashed | 45 Madison Street, Worcester, MA |
| Paul Richards | 1420 Main Street, S. Weymouth, MA |
| Harvy Rudnick | 491 Walpole Street, Norwood, MA |
| Fred Saad | 127 Main Street, Milford, MA |
| Aziz Saba | 54 S. Main, Bradford, MA |
| Walid Samrout | 54 Chauncy St, Mansfield, MA |
| Earl Stickney | 26 Commercial Road, Leominster, MA |
| Thomas Sullivan | 211 East Boston Street, E. Boston, MA |
| Roger Thibault | 290 President Avenue, Fall River, MA |
| Dimitrious Tsanikilides | 145 Spring Street, W. Roxbury, MA |
| Toufic Atallah | 430 Taunton Avenue, Seekonk, MA |
| Dror Dusdushman | 510 VFW Parkway, W. Roxbury, MA |
| Earl McLaughlin | 123-127 Union, Ashland, MA |
| Stephen Shea | 122 Boston Street, Lynn, MA and 110 Main Street, Reading, MA |
| John Sullivan | 141 Front Street, Scituate, MA |
| Wilson Tiburtino | 1363 S. Main & Broadway and 33 Mariano Bishop, Fall River, MA |

6. Defendant, Shell Oil Products Company, Inc., was and is now, a corporation duly organized and existing

under the laws of the state of Delaware, with its principal place of business at One Shell Plaza, Houston, Texas 77067.

7. Defendant, Motiva Enterprises, LLC, ("Motiva") is a Delaware Limited Liability Corporation with its principal place of business at 12700 Northborough, Ste. 100, Houston, Texas 77067. It is a joint venture of Shell Oil Products Company, Inc., Texaco, Inc., and Saudi Aramco. These companies announced the formation and operational start up of Motiva on August 1, 1998. It is a combining of major elements of these companies, in Eastern and Gulf Coast United States refining and marketing businesses.

**ALLEGATIONS of FACT**

7. For many years, Shell had the best relationship with its dealers of any oil company, [and] was seen as [a] 'dealer orientated company'. This situation changed in the late 1990's and Shell/Motiva's conduct, such as its insistence upon franchise terms that were outlawed over its opposition in 1994, has made Shell difficult, if not impossible to deal with.

8. Most prominently, since the announcement of a joint venture with Texaco, resulting in the formation of the defendant, Motiva and Equiva Enterprises, LLC, the dealers[ ] have become targeted for elimination, pursuant to a plan that, on information and belief is called the "Strategic Marketing Initiative".

9. The SMI is contained in a series of documents and executive summaries that set[ ] forth the move to replace the dealers with company and commission operated stations, constrained only by legal and political opposition.

10. Indeed, the renewal contracts form a template for dealer elimination by purporting to allow the following:

    (1) imposition of oppressive and unconscionable rent increases on the dealers, that standing alone are often enough to force the dealer to either leave the location, allowing the company to change the location to a "CORO" or contractor operated retail outlet, or "SORO", salary operated retail outlet. The idea behind a "CORO" is to strip the retailers of their protected status as franchisees under state and federal law; while giving the company control over the retail pricing at the station.

    (2) attempting to illegally force assignees of dealer franchise agreements to take nearly valueless "trial franchises" as that term is defined in the Petroleum Marketing Practices Act, 15 U.S.C. 2801, as opposed to the regular franchise mandated by 15 U.S.C. 2801(1)(B)(iii); and 15 U.S.C. 2806(a), enabling Motiva to utilize its "first refusal right" to match offers to dealers at depressed or fire sale prices, or to remove anyone after one year if they so desire.

    (3) attempting to require, as a condition of renewal, that the dealer release Shell from claims arising out of prior franchise relationships; and

    (4) attempting to define new reasons for franchise termination in the franchise agreements, that are contrary to the PMPA.

11. The company has become so brazen, that some regional managers, including here in New England, have openly told the dealers "that at least two-thirds of them will be eliminated within two years.["]

12. This institutional arrogance is also reflected in the offending provisions of the contracts themselves, which are contrary to 1994 Amendments to the PMPA, Amendments that Shell and Texaco waged an unsuccessful campaign of distortion against in the 103rd Congress.

13. Under the 1994 Amendments, and 15 U.S.C. 2805, no company, especially these the two major opponents of the new provisions, may condition renewal of a franchise relationship, upon the inclusion of franchise provisions, that purport to waive any right the franchisee may have.

14. The Shell contracts, which are attached hereto, and incorporated herein by reference, contain provisions which purport to release any claims the franchisee may have under any previous agreement, See, Retail Sales Agreement at paragraph 28, Retail Facility Lease at paragraph 31.

15. The most effective of the dealer elimination tools is [] to increase the costs of doing business to the dealer. Shell has embark[ed] upon a new system of pricing at SORO's and CORO's that [is] designed to facilitate the dealer elimination and has engaged in other wholesale pricing manipulation that violate[s] the provisions of law, set forth, infra. The most obvious of the dealer elimination tools is the rent, and the failure to honor "The Pledge" that the Variable Rent program or its equivalent would be in place.

**The Variable Rent Program**

16. Prior to the late 1990's, Shell sold gasoline, gasoline related products and other products and services such as are commonly sold at retail gasoline stations (hereafter collectively, "gasoline products") to the public

only through independent franchised retail dealers such as the Plaintiffs. The principal product sold to the public by such dealers was gasoline and diesel fuel, but dealers also variously operated convenience markets, car washes and repair services.

17. The dealers have conducted and still conduct their retail operations under written franchise agreements with Shell. Such agreements consist of multiple preprinted documents unilaterally prepared by Shell.

18. The agreements are contracts of adhesion whose essential terms were not negotiable in any manner before execution. Pursuant to these contracts, Shell provides the station premises, which the dealer leases under a form ground lease entitled "Motor Fuel Station Lease", or in its most current version, a Retail Motor Fuel facility lease.

19. Shell also provided a written form "Dealer Agreement" as a part of the franchise package, which all dealers are required to execute. The latest version of the Document is called a Motor Fuel Supply Agreement. Each dealer purchased and purchases "Shell" branded petroleum products under this agreement for resale to the public.

20. Before Shell permitted a prospective dealer to enter into a franchise agreement, it required completion of a pro forma profit and loss statement for the proposed location. In New England, such prospective dealer statements were prepared together by the dealer and by Shell's representatives. Shell reviewed each such statement to satisfy itself as to the economic viability of the franchise before entering into a franchise agreement for that station. Such statements always clearly showed that the dealer's premises rent and cost of gasoline products, together, de-

termined the profitability of the dealer's business. The dealers relied on these projections in undertaking the franchise relationship; and Shell knew that the dealers relied thereon.

21. As set forth, *supra*, Gasoline costs and station rents are the largest components of the cost of doing business for a retail gasoline dealer, including the co[s]ts imposed upon the Plaintiff. Shell dealers buy gasoline from their franchisor, Shell, which has always and by contractual right unilaterally set the prices which the dealers pay for gasoline products. The Shell dealers' written motor fuel station leases include a stated rent that is known as "Contract Rent". That figure is and was set pursuant to a secret formula that remains unknown to the dealers to this day.

22. The "Contract Rent" is a figure that through the course of dealing has little meaning other than to serve as the baseline for calculation of the actual rent paid under the VRP. Dealers simply did not pay Contract Rent, and Shell and its representatives encouraged the Dealers to ignore the Contract Rent figure.

23. The actual station rents would be charged under a "variable rent program" by which Shell granted the dealers a credit against each following month's rent, usually at the rate of 4.5 cents for each gallon of motor fuel which the dealer purchased from Shell over a figure known as the "VRP Threshold".

24. The VRP threshold was set by local Shell management pursuant to a secret formula or guideline, which was often zero. In this way, Shell tied the actual station rents directly to the volume of gasoline being put through the station. This variable rent program, or VRP, resulted in dealers' effective station rent being far below the pre-printed "Contract Rent"; and in fact

when reviewing contracts for renewal of the franchise relationship, Shell personnel would go so far as to chide the Dealers[ ] for even looking at the Contract Rent figure.

25. The VRP was the foundation of the course of dealing between Shell and the dealers[ ] for over 16 years. Indeed, in a number of forums, such as other cases, and legislative hearings, high level Shell personnel with decision making authority have described the "VRP" as the cornerstone of Shell's marketing efforts, the item that allowed Shell to rise to the top of the U.S. gasoline volume charts and something that its competitors did not have an answer for.

26. While Shell has recently attempted to characterize the VRP as a voluntary program, every Shell dealer participated in the program, it was memorialized in various writings as well as through a 16 year course of dealing from Portland, Maine to Portland, Oregon, and in fact was not voluntary at all. Indeed, the VRP was such a critical component of the Shell marketing scheme, that Shell encouraged the dealers to oppose federal and state legislative initiatives on the claim that such legislation, if enacted, would require changes to, or elimination of the VRP.

27. Shell's written communications that contained the "offers of variable rent program," stated that Shell could, at its option, discontinue or modify the program on 30 days notice. Nevertheless, in addition to the course of dealing between the parties, the dealers' received numerous types of assurances that VRP or its equivalent would be there for them, to ignore the language of the VRP offer letters; and to ignore the contract rent figure, as it was something that they would not have to pay, as Shell knew that the Dealers

could not survive, much less prosper, if the VRP was terminated, and an equivalent substitute not put in its place.

28. For over 16 years, the dealers received assurances from the highest levels of the marketing department on down to the field sales representatives, that the VRP program would always be there for them, or that in the alternative, [] a program that would be the equivalent of VRP would be put in place as Shell was very aware that dealers could not pay the "Contract Rent" and survive.

29. These assurances were given to dealers through Shell's dealer panels, which were groups of dealers that Shell had appointed both regionally and nationally purportedly as representative of all dealers, as well as through general meetings of dealers in the geographic area and through individual communications by Shell representatives to current and prospective dealers. Shell kept the minutes of these meetings, and provided written transcripts thereof to the dealer representatives.

30. Other writings reinforce the point that the economic and legal reality was that the VRP was anything but a voluntary, short-term program, and that Contract Rent did not serve as anything other than a baseline for VRP calculation. For example, Shell also routinely provided to its dealers a document[ ] called the "Delivery Platform Summary", which indicated gasoline delivery volumes and changes in those delivery volumes. These documents prominently featured [] printed "variable rent calculations" which reflected the VRP allowance and calculated the actual (as distinguished from the stated) rent.

31. Shell, through its duly authorized representatives, encouraged and even demanded that the dealers take actions based upon the "VRP Pledge", and engaged in a pattern of misrepresentation with respect to the rent provision, and in reliance upon these representations, the Dealers made substantial investments including, but not limited to:

    (1) Purchasing the franchise rights at Shell branded stations;

    (2) purchasing the franchise rights of dealers that Shell did not like, due to the active encouragement of Shell management;

    (3) investing in ancillary business located at the motor fuel marketing premises such as convenience stores, and car washes; and

    (4) entering into renewals of the franchise relationship with Shell based upon the misrepresentations with respect to the contract rent, as opposed to taking other action, such as selling the franchise.

32. In addition, the Dealers" generally adopted a marketing strategy based upon paying "VRP rent" as opposed to "Contract Rent"; that enabled them to sell fuel to the public at prices lower than would be possible if "Contract Rent" was charged.

33. Again, all of these actions were taken in the context of a lengthy course of dealing, and Shell representatives telling the dealers to pay no attention to the Contract Rent, or the "offers of variable rent program" to the extent it stated that Shell could at its option discontinue or modify the program on 30 days' notice. There were innumerable representations to the effect that the "Contract Rent" was something the Dealers'

would never have to worry about, and never have to pay.

34. By using the variable rent program to tie the station rent directly to the volume of gasoline it delivered to each station, Shell made the ground rent a part of the price it charged the dealers for its gasoline products. Since defendants obtain their revenues from the operation of franchised independent retail Shell stations primarily from a combination of station rents and gasoline purchase prices, they have in practice and for their own business purposes treated station rents and gasoline sales revenues as interchangeable parts of their revenue stream. The dealers' profitability has in turn been based on the interdependence of reasonable rents and reasonable fuel prices. Among the claims of the dealers herein is a claim that an undisclosed rental charge was hidden in the price of gasoline.

35. At all times material hereto, defendants well knew that if the VRP program terminated, the price for gasoline products would become oppressively high and unfair and that the dealers[']profit would erode to such a point so as to force the dealers out of business.

36. By virtue of its status as a joint venture of Shell and Texaco, Motiva and Equiva are charged with knowledge of all that Shell knew and of all commitments Shell made to the dealers.

37. In entering into their franchise agreements and performing there under, the plaintiffs and all Shell dealers relied on the representations that the motor fuel station rents stated in the station leases were pro forma and would not be enforced, but that rents would be calculated under the VRP program or its equivalent. At no time until the events hereafter re-

lated did the dealers have any reason to suspect that these representations about the manner in which their actual rent was calculated were not truthful or would not be kept, or that defendants had any intention not to perform those promises throughout the relationship of the parties. The fact that defendants had intimate knowledge of the dealers[']] financial planning and of their actual financial results on a monthly basis, which plans and results reflected the critical role of the VRP rent program in maintaining the dealers' solvency, reinforced the dealers' belief that defendants would keep their promises about maintaining viable station rents.

38. Equiva and Motiva assumed Shell's responsibilities for day-to-day operations with the dealers August 1, 1998.

39. In and about July 1998, Equiva and Motiva informed plaintiffs that it was terminating the Variable Rent Program, effective shortly thereafter. Equiva and Motiva then offered dealers in various regions differing "substitute" gasoline rebate program which varied from the VRP program in [ ] significant respects.

40. Effective January 1, 2000, Motiva and Equiva abandoned the last of the substitute programs, and began doing what it said it would never do, because it knew the dealers[ ] could not survive: charge full "Contract Rent" or the new "Program Rent" for those dealers whose franchise relationships have come up for renewal. As set forth more fully, *infra*, these rents were often several multiples of the rents which the dealers had paid for many years under the prior VRP program.

41. Defendants' charging of the stated rents has made the operations of the Plaintiffs' locations, as well as those of an overwhelming majority of franchised Shell retail dealers' businesses uneconomical. This program has caused plaintiffs and other similarly situated dealers great losses, and some dealers are being forced into insolvency by it.

**FAIR MARKET VALUE or PROGRAM RENT**

42. In addition to charging the "Contract Rent" to those dealers who[se] franchises have not come up for renewal, the Defendants have moved ahead with Program Rent, or what is more accurately termed "disenfranchisement Program Rent". While this rent is ostensibly based upon the fair market value of the location, plus triple net expenses, the fact is that the retailers are not given a disclosure of the evaluation, and if challenged, the retailer is limited to choosing a Shell designated appraiser, paying for an appraisal, which the retailer is then not allowed to see! For example, unless and until confronted with sanctions motions, one of which recently resulted in a default judgment against an allied company, the Company denies having access to basic records such as credit card records and dealer files[ ]. The key point is that Shell top level management implemented this program fully knowing and intending that the dealers would not survive it; as evidenced by the Mercer consulting work, and consistent with the representations made to the dealers that the VRP or a substitute would always be in place, because Shell knew that the dealers could not survive without it.

## PRICING

### I. Shell's "Price Pads"

43. Shell sells its gasoline directly to its dealers, including the Plaintiffs, at "tank wagon" ("dealer tank wagon" or "DTW") prices established solely by Shell. Shell manufactures the gasoline it sells to the Plaintiffs at its refinery in various parts of the Country, and distributes its gasoline from facilities, known in the trade as "the rack", as delivery racks exist at this terminal where Shell, its distributors, and unbranded marketers pick up gasoline refined by or otherwise obtained by the defendants and certified by them to meet their trademark specifications.

44. Shell delivers all Shell gasoline directly to each of the Plaintiffs' stations in delivery trucks, *i.e.* tank wagons, owned and operated by Shell, or in some cases, Shell delivers gasoline to Plaintiffs via common carriers. The Plaintiffs are charged Shell's DTW price existing at the time the fuel is loaded at the applicable rack. Shell sells its gasoline to the Dealers, and the Dealers purchase their Shell gasoline in the course of interstate commerce.

45. The Plaintiffs do not, however, pay the same price for the same gasoline. Shell, in conjunction with a consulting firm known as MPSI, Inc., has recently changed its pricing system, and has arbitrarily established "price pads" or zones in the affected metropolitan areas. Contrary to economic reality, and course of dealing in the industry, Shell places individual stations in their own price zone, thus station[s] could be across the street from each other, but have different wholesale prices as Shell discriminates in its DTW prices to the Dealers.

46. Shell tank wagons are often "re-routed" when the original dealer-purchaser is unable, for some reason, to accept the fuel delivery. These "re-routed" tank wagons then deliver the identical load of gasoline to another dealer. Even though the gasoline is identical and the sale occurs within hours of the aborted sale, Shell often charges a different price for the gasoline to the ultimate dealer-purchaser.

47. The cost of transportation incurred by Shell in delivering the Dealers' gasoline does not justify these price differences. For example, many plaintiffs pay a DTW price for Shell gasoline delivered to their Shell stations than other Shell Dealers even though the other Shell dealers may be located more than 30 miles farther from Shell's distribution facility or rack.

48. The Dealers are competitors with each other for the retail sale of gasoline. Therefore, the differential in DTW prices charged by Shell to these dealers creates "favored" and "disfavored" classes of retail resellers of gasoline. The favored sellers are able to, and have in the past, dropped their retail (or "street") price of gasoline to correspond with the tank wagon discount afforded them by Shell. Such discounts in the street price for Shell gasoline causes economic injury to those competing with disfavored Shell Dealers, because the disfavored dealers must either reduce their "margin" by also dropping their street price, or face reduced sales of gasoline due to their higher street price.

49. On information and belief, Shell has designed the system so as to eliminate key competitors that should by any logic, be considered as competitors of the dealer operated stations. In addition to manipulating the MPSI system work in drawing the zones, Shell re-

gional personnel have substantial discretion in setting a wholesale price pursuant to a program known as SPEARS, or street back evaluation and response.

50. While the SPEARS program was ostensibly put in place to help the dealers, the fact is that it is now used as a method to limit dealer margins, and target the locations most fervently desired for company operation.

51. In addition to discriminating between franchisees, Shell also has a new program to benefit the CORO and SORO locations, and to make the claim to shareholders that these company operated locations are more profitable to Shell. Specifically, the profitability of these locations is judged by assuming no rent or other real estate occupancy cost (despite the fact that by operating the stations, Shell forgoes any rent); and more importantly, it assumes that the lower wholesale prices such as the jobber rack price, or the spot market price is the price charged for accounting purposes, not the much higher DTW or dealer tankwagon price.

52. Finally, Shell also sells its gasoline to unbranded marketers at prices 20 cents or more per gallon less than the DTW its charges the dealers. Even given a 4 cent per gallon brand value, and a maximum volume discount, this evidence shows that Shell's DTW is at least 12-15 cents per gallon higher than can be justified.

53. Shell has recently offered temporary "discounts" to [its] dealers of up to 2 cents per gallon, but is conditioning receipt thereof upon the dealer lowering his or her already squeezed margin even further; in a futile attempt to compete with the growing fleet of

CORO and SORO locations, which enjoy an artificial and discriminatory price advantage.

**OTHER ELEMENTS Of The PLAN**

54. In addition to the cost-price squeeze outlined above, Motiva and Equiva regional units were directed to set aside funds in their capital improvement budgets to "buy out" dealers, particular[ly] those who were likely to be involved in leading "cells of dealer resistance" or to otherwise survive the onslaught.

55. Two key provisions of the new contracts provide that Shell has the right to match any offer the dealer has for the business, and that any prospective assignee will be given a worthless trial franchise. These two provisions, combined with the squeeze on the dealer's profitability[ ] (most offers are based upon 3 years profits)[,] assure that Shell can reacquire the stations at firesale prices, and move forward with the grand plan to convert the network to company operation.

**CAUSES OF ACTION**

**I: INJUNCTIVE RELIEF PURSUANT TO THE PETROLEUM MARKETING PRACTICES ACT**

56. The plaintiff dealers repeat and incorporate by reference paragraphs 1-55 as if fully set forth herein.

57. The plaintiff dealers are franchised dealers of motor fuel in a contractual relationship with Shell, a refiner of motor fuel, as defined by the Petroleum Marketing Practices Act, 15 U.S.C. § 2801, et seq.

58. By terminating the Variable Rent Program and charging the plaintiff dealers the unconscionably high rents of the Contract Rent and Program Rent structures, and by revising the pricing structure, and imposing a number of "offending" provisions in the new

contracts [*sic*] terminated the plaintiff dealers' franchises.

59. Shell has made the changes to the franchise agreements in bad faith, and for the purpose of converting stations operated by the franchised dealers to CORO and SORO operation, i.e. for Shell's own account, in violation of the PMPA. Pursuant to the standards set forth by the Petroleum Marketing Practices Act, 15 U.S.C. the individual dealers seek a preliminary and permanent injunction preventing the imposition of either full "Contract Rent" or the "Program Rent". The injunctive relief is requested on the grounds that: the dealers' franchises have been constructively terminated by Shell's termination of the Variable Rent Program and failure to provide a similar alternative;

    there exists sufficiently serious questions going to the merits to make such questions a fair ground for litigation; and

    the hardship suffered by Shell by reinstating a rent program that it maintained for over 16 years would be minimal compared to the egregious harm that will occur to the dealers, that being the end of their businesses and livelihood, if such preliminary injunction is not granted.

**II: VIOLATION OF THE PETROLEUM MARKETING PRACTICES ACT**

60. The plaintiffs repeat and incorporate by reference paragraphs 1-59 as if full[y] set forth herein.

61. The plaintiff dealers are franchised dealers of motor fuel in a contractual relationship with Shell, a refiner of motor fuel, as defined by the Petroleum Marketing Practices Act, 15 U.S.C. § 2801, et seq.

62. The Petroleum Marketing Practices Act strictly regulates the requirements for a refiner of motor fuel, such as Shell, to terminate the franchises of dealers of motor fuel, such as the plaintiff dealers.

63. By terminating the Variable Rent Program and instituting the unconscionable rents under the Program Rent structure, in the face of its express and implied promises that it would not do so, Shell has and is terminating the dealers' franchises in violation of the Petroleum Marketing Practices Act.

64. By terminating the Variable Rent Program and instituting the unconscionable rents under the Program Rent structure, in the face of its express and implied promises that it would not do so, Shell has and is attempting to convert the dealers' franchises into commission operated retail outlets ("CORO"), or salary operated locations ("SORO"), in violation of the Petroleum Marketing Practices Act[,] 15 U.S.C. § 2802(b)(3)(A)(ii).

65. By including waiver and release clauses in its retail lease and service agreements, Shell has and is violating the Petroleum Marketing Practices Act, 15 U.S.C. § 2805.

66. In accordance with the provisions of the Federal Declaratory Judgment Act, 28[ ] U.S.C. § 1331, declaratory relief is requested that this Court enter a judgment that the actions of the Defendants as above described in this complaint have violated the provisions of the Petroleum Marketing Practices Act.

67. In addition, Plaintiffs seek monetary damages, compensatory and punitive, together with interest, costs, and attorney's fees, for all of the above violations and

the loss of value with respect to Plaintiffs' dealer franchises.

**III: VIOLATION OF THE MASSACHUSETTS REGULATION OF BUSINESS PRACTICES FOR CONSUMERS PROTECTION**

68. The plaintiffs repeat and incorporate by reference paragraphs 1-67 as if fully set forth herein.

69. The Defendants are in trade or commerce as defined by Massachusetts General Laws, Chapter 93A.

70. The acts of Shell/Motiva, including, without limitation, expressly misrepresenting to the dealers that the Variable Rent Program or a similar rent program would always be kept in place, in manipulating the price zones, charging a transfer price to CORO and SORO locations that is less than dealer tank wagon, and failure to implement the "Fair Market Value Rent" as promised constitute unfair and/or deceptive acts, as prohibited by the terms of Chapter 93A.

71. Plaintiffs seek monetary damages, compensatory and punitive, together with interest, costs, and attorney's fees, for all of the above violations and the loss of value with respect to Plaintiffs' dealer franchises.

**VII: VIOLATION OF THE MASSACHUSETTS REGULATION OF DEALERS' AGREEMENTS FOR THE SALE OF GASOLINE**

72. The Plaintiffs repeat and incorporate by reference paragraphs 1-71 as if full[y] set forth herein.

73. The Defendant, Shell/Motiva, is a supplier as defined by Massachusetts General Laws, Chapter 93E.

74. The acts of Shell/Motiva, including, without limitation, expressly misrepresenting to the dealers that the Variable Rent Program or a similar rent program

would always be kept in place, constitute failures on the part of Shell/Motiva to make requisite disclosures pursuant to Massachusetts General Laws, Chapter 93E, Section 3, et seq.

75. The acts of Shell/Motiva, including, without limitation, expressly misrepresenting to the dealers that the Variable Rent Program or a similar rent program would always be kept in place, constitute failures on the part of Shell/Motiva to make requisite disclosures pursuant to Massachusetts General Laws, Chapter 93E, Section 3, et seq.

76. The acts of Shell/Motiva, including, without limitation, expressly misrepresenting to the dealers that the Variable Rent Program or a similar rent program would always be kept in place, constitute unfair methods of competition and/or unfair and deceptive practices or acts as prohibited by Massachusetts General Laws, Chapter 93E, Section 5, et seq.

77. Plaintiffs seek monetary damages, compensatory and punitive, together with interest, costs, and attorney's fees, for all of the above violations and the loss of value with respect to Plaintiffs' dealer franchises.

**IX: BREACH OF CONTRACT**

78. The plaintiff[s] repeat[ ] and incorporate[ ] by reference paragraphs 1-77 as if full[y] set forth herein.

79. The acts of Shell/Motiva, including, without limitation, expressly misrepresenting to the dealers that the Variable Rent Program or a similar rent program would always be kept in place, constitute a breach of contract, actual or implied, between Shell and the dealers, that it would not do so.

80. Plaintiffs seek monetary damages, compensatory and punitive, together with interest, costs, and attorney's

fees, for all of the above violations and the loss of value with respect to Plaintiffs' dealer franchises.

## X: FRAUD/MISREPRESENTATION

81. The plaintiff[s] repeat[ ] and incorporate[ ] by reference paragraphs 1-80 as if full[y] set forth herein.

82. The acts of Shell/Motiva, including, without limitation, expressly and intentionally misrepresenting to the dealers that the Variable Rent Program or a similar rent program would always be kept in place, constitute fraud, deceit and/or misrepresentation.

83. The dealers have relied on the misrepresentations of Shell in being induced to enter into their franchise agreements, to invest time and money into their franchises and have been induced to enter into renewals of their franchise agreements based on these misrepresentations.

84. As a direct result of their reliance on Shell's misrepresentations, the dealers have and are suffering immediate and irreparable harm, including, without limitation, extreme pecuniary loss.

85. Plaintiffs seek monetary damages, compensatory and punitive, together with interest, costs, and attorney's fees, for all of the above violations and the loss of value with respect to Plaintiffs' dealer franchises.

## XI: PROMISSORY ESTOPPEL

86. The plaintiff[s] repeat[ ] and incorporate[ ] by reference paragraphs 1-85 as if full[y] set forth herein.

87. In order to induce the plaintiff dealers to enter into or renew their franchise agreements with Shell, the company promised and agreed that the Variable Rent Program or a similar alternative would always be maintained by Shell.

88. Pursuant to that promise, the plaintiff dealers made substantial investment, pecuniary and otherwise, into the establishment and growth of their respective franchises. Wherefore equity requires that Shell be stopped from now terminating the Variable Rent Program or a similar alternative.

## XII: BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

89. The plaintiff[s] repeat[ ] and incorporate[ ] by reference paragraphs 1-88 as if full[y] set forth herein.

90. At all times relevant, the franchise agreements between plaintiffs and defendants contained an implied covenant of good faith and fair dealing that neither party would do anything that would injure the right of the other to receive the benefits of the franchise agreements.

91. The acts of Shell/Motiva, including, without limitation, expressly misrepresenting to the dealers that the Variable Rent Program or a similar rent program would always be kept in place, constitute a breach of this implied covenant.

92. Plaintiffs seek monetary damages, compensatory and punitive, together with interest, costs, and attorney's fees, for all of the above violations and the loss of value with respect to Plaintiffs' dealer franchises.

## JURY DEMAND

93. Plaintiffs[ ] claim trial by jury as to all causes of action.

## PRAYER FOR RELIEF

Pursuant to the foregoing, the Plaintiffs pray that this Honorable Court:

1. Issue an injunction requiring Shell to maintain the Variable Rent Program, or an equivalent program, and to enjoin the instituting of the Program Rent structure, or charging the dealers "Contract Rent".
2 Enter a declaratory judgment adjudging the Offending Provisions of the Shell contracts to be unlawful under federal and state law.
3. Award damages, compensatory and punitive, including costs, interest, and attorneys' fees.

Award such other relief, as this Honorable Court deems reasonable and appropriate.

Respectfully Submitted:
The Plaintiffs,
By their attorneys

Dated:

/s/
ROBERT E. WEINER
BBO#: 551980
LAW OFFICES OF ROBERT E. WEINER
One Longfellow Place, Suite 3409
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[Service Stamp: 7/26/01]

**UNITED STATES DISTRICT COURT**
**DISTRICT OF MASSACHUSETTS**

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CIVIL ACTION NO. 01-11300-RWZ

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FRANCIS MARCOUX, ET AL.,

v.

SHELL OIL PRODUCTS CO., INC.
AND MOTIVA ENTERPRISES, LLC

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**MEMORANDUM OF DECISION**

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**October 7, 2002**

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ZOBEL, D.J.

On June 30, 2000, lessee-dealers of Shell brand automobile gasoline, acting through the Shell Dealers Defense Group ("Group"), and other individual franchisees, filed an action against Shell Oil Products Company and Motiva Enterprises ("defendants") for numerous causes of action centered on the defendants' termination of its Variable Rent Program ("VRP"). *See Demetrios Tsaniklides, Jr., et al. v. Shell Oil Products Co., Inc. and Motiva Enterprises, LLC*, Civil Action No. 00-11295. After the Court determined that the Group did not have standing, the lessee-dealers sought to amend the complaint to add themselves in their individual capacities. On June 12, 2001, the Court denied the motion, but stated that plaintiffs "may file a new case which may be deemed to be related." On the same day, the Court ordered that the cases involving the Rhode Island plaintiffs and New

Hampshire plaintiffs be transferred to their respective states. The remaining parties subsequently stipulated to a dismissal of the action without prejudice. The present action seeking the same relief was then filed on July 27, 2001. Defendants have filed a Motion to Dismiss and a Motion for Judgment on the Pleadings.

Defendants contend that Counts One and Two of plaintiffs' Amended Complaint concerning constructive termination are barred by the one-year statute of limitations under the Petroleum Marketing Practices Act, 15 U.S.C. § 2805 ("PMPA"). Defendants assert that the statute of limitations began to run when Shell terminated the VRP on August 1, 1998, while plaintiffs allege that it began on January 1, 2000, when the VRP substitute was eliminated. Count One of the Amended Complaint states that plaintiffs seek injunctive relief on the grounds that the "dealers' franchises have been constructively terminated by Shell's termination of the Variable Rent Program or a similar alternative. . . ." (Paragraph 49, Subparagraph 1.) Count Two incorporates the same statement by reference. Paragraph 42 of the Amended Complaint states that Shell/Motiva abandoned the last substitution of the VRP on January 1, 2000 and began to charge "Contract Rent" or the new "Program Rent."

Viewing the facts as stated in the Amended Complaint in a light most favorable to the plaintiffs, the statute of limitations for the PMPA claims began to run on January 1, 2000. Plaintiffs then filed suit on June 30, 2000, well within the one-year statute of limitations. Since the present suit is deemed to relate back to the date of the original complaint in accordance with the Court's order dated June 12, 2001, plaintiffs' PMPA claims are not time barred. In fact, none of plaintiffs' claims, including the state law claims, is barred by the PMPA's statute of limi-

tations. Similarly, plaintiffs' claims under M.G.L. ch. 93E are timely.

Defendants also contend that the Rhode Island plaintiffs (except for Paul Sroczynski and his corporation, J. Enterprises) and the New Hampshire plaintiffs (except for Charles Lagasse, Kach Corporation and Ali Jaber), who did not file suit individually in the first action, are time barred. However, both sets of plaintiffs were parties to the first action as members of the Group. The Court ordered that the cases involving those out-of-state plaintiffs be transferred to their respective states pursuant to 28 U.S.C. § 1406(a). Because those actions relate back to the date of the first action, they, too, are timely.

Defendants' motion to dismiss plaintiffs' claim for fraud and misrepresentation is allowed. "In the First Circuit, Rule 9(b) requires a party pleading fraud to specify the time, place, and content of the alleged false representation." *Mead Corp. v. Stevens Cabinets, Inc.*, 938 F. Supp. 87, 90 (D. Mass. 1996). Paragraph 31 of the plaintiffs' amended complaint states that "[f]or over 18 years, the dealers received assurances from the highest levels of the marketing department on down to the field sales representatives, that the VRP would always be there for them. . . ." Plaintiffs have not specified either the time or place of defendants' misrepresentations regarding the VRP as required.

Finally, defendants' assertion that allegations of constructive termination of the franchise are not covered by the PMPA is simply wrong. *See Riverdale Enterprises Inc. v. Shell Oil Co.*, 41 F. Supp. 2d 56, 62 (D. Mass. 1999) (stating that "[a]bsent a claim of per se unlawful termination, a PMPA franchisee must show that a constructive termination has occurred.").

Accordingly, the defendants' Motion to Dismiss and Motion for Judgment on the Pleadings as to the plaintiffs' fraud and misrepresentation claim is allowed. As to all other claims, the motions are denied.

[October 7, 2002]
DATE

/s/ Rya W. Zobel
RYA W. ZOBEL
UNITED STATES DISTRICT JUDGE

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MASSACHUSETTS**

| | | |
|---|---|---|
| MAC'S SHELL SERVICE, INC., et al., | ) | [Filed 01/13/2003] |
| Plaintiffs, | ) | C.A. No. |
| v | ) | 01-CV-11300-RWZ |
| SHELL OIL PRODUCTS COMPANY, LLC (f/k/a SHELL OIL PRODUCTS COMPANY), SHELL OIL COMPANY, and MOTIVA ENTERPRISES, LLC, | ) | |
| Defendants. | ) | |

**SECOND AMENDED COMPLAINT AND JURY DEMAND**

## I. INTRODUCTION

1. This civil action seeks to prevent irreparable and irremediable harm to Plaintiffs, which includes, *inter alia*, loss of Plaintiffs' businesses and harm to Plaintiffs' business goodwill and reputations. The Plaintiffs are franchised dealers of Shell brand automobile gasoline. The harm is occurring due to the wrongful conduct of the Defendant franchisors, Shell Oil Products Company LLC (f/k/a Shell Oil Products Company), Shell Oil Company and Motiva Enterprises, LLC, whose wrongful conduct includes such actions as forcing unreasonable and oppressive franchise provisions upon Plaintiffs that would make continued operation of Plaintiffs' franchises uneco-

nomical and would, in the regular course, allow Defendants to take over Plaintiffs' franchise locations for their own account.

2. Defendants are attempting to economically evict the dealers from their franchised locations by, among other things, terminating their rent programs that have been in place for over 18 years (knows as the "Variable Rent Program") without replacing it as promised and agreed to by Defendants with an equivalent or comparable rent program. Defendants have replaced the Variable Rent Program and a comparable Variable Rent Program substitute with a new oppressive non-comparable rent program, known as "Program Rent," or are now charging full rent described as "Contract Rent", despite an agreement between the parties that Contract Rent would not be charged. That Defendants made this agreement with Plaintiffs[ ] is not only evidenced by the oral representations made by Defendants to Plaintiffs, but also is established and evidenced by the long standing course of dealing and course of conduct that has taken place between Defendants and Plaintiffs[ ] since the Variable Rent Program was instituted in 1982, over twenty years ago.

3. Defendants fraudulently induced the Plaintiff franchisees to sign the written franchise agreements by misrepresenting their intentions concerning the duration of the Variable Rent Program. Defendants declared from the outset of the part[ies'] relationship that the Contract Rent provisions were to be inoperative and represented that it harbored no intention of invoking the Contract Rent provision; thus, these oral representations then became the basis of the binding agreement between the parties.

4. The Contract Rent provision was not the result of negotiations between the parties; rather, the provisions were inserted unilaterally by Defendants. It was Plaintiffs' acceptance of Defendants' assurances on the issue of the Variable Rent Program that constituted the parties' agreement on this issue and not the contradictory written provision in the franchise agreements which Plaintiffs were induced to sign.

5. When the Plaintiffs signed the franchise documents, which included in [them] the Contract Rent provision, and at the same time Defendants repeatedly and expressly stated that the provision was a mere technicality never to be effective, the parties did not adopt the franchise agreement as their complete integrated agreement. Rather, Plaintiffs only signed a document that contained terms that were expressly limited by Defendants' independent oral agreement guaranteeing a Variable Rent Program or its equivalent.

6. Where Defendants stood in a greatly disparate position with respect to Plaintiffs, Plaintiffs' reliance upon and acceptance of Defendants' oral representations limiting their written agreement were objectively reasonable, and these oral agreements became integral parts of the contracts between the parties.

7. Defendants have unilaterally changed the agreed upon term despite the fact that Defendants openly stated that they knew that the dealers could not survive economically without the Variable Rent Program or a comparable rent program. Defendants' actions in this regard amount[ ] to an economic termination of the dealers' franchises in violation of the Petroleum Marketing Practices Act, 15 U.S.C. § 2802 ("PMPA").

8. Under the new rent structure imposed by the Defendants, rents to the Plaintiffs are increasing drama-

tically, three to four times more than the rent that Plaintiffs have been subject to since the establishment of their franchises, in many cases, the new rent, be it Program Rent or Contract Rent, is in excess of the annual profit of Plaintiffs' businesses. The Contract Rent provisions are the very ones that Defendants' representatives promised and agreed would never take effect. Defendants remain aware that Program Rent or charging full Contract Rent all but guarantees the failure of all but a few of the Plaintiffs' franchises and businesses and will significantly and adversely reduce the value and profitability of those franchises that are able to survive.

## II. Parties, Jurisdiction, and Venue

9. Plaintiff Abraham V. Abraham is a former Shell franchisee with a former principal place of business at 264 Timpany Blvd., Gardner, Massachusetts.

10. Plaintiff J & M Avramidis, Inc. (d/b/a Walpole Shell) is a Shell franchisee with a principal place of business at 920 Main St., Walpole, Massachusetts.

11. Plaintiff Expressway Service Station, Inc. is a Shell franchisee with a principal place of business at 10 Hojo Plaza, Dorchester, Massachusetts.

12. Plaintiff Richard H. Baima (d/b/a Plaza Shell), is a Shell franchisee with a principal place of business at 139 Medway St., Milford, Massachusetts.

13. Plaintiff E.H. Baker, Inc., is a former Shell franchisee with a principal place of business at 875 Highland Ave., Needham, Massachusetts.

14. Plaintiff Olive Street Associates, Inc. (d/b/a Plymouth Ave. Shell) is a Shell franchisee with a principal place of business at 372 Plymouth Ave., Fall River, Massachusetts.

15. Plaintiff James Coggeshall (d/b/a Jim's 139 Shell and Jim's Westgate) is a former Shell franchisee with principal places of business at Mazzeo Drive (Rt. 139), Randolph, Massachusetts and 612 Oak St., Brockton, Massachusetts.

16. Plaintiff Michael Corbett (d/b/a City Square Shell) is a Shell franchisee with a principal place of business at 1 Rutherford Ave., Charlestown, Massachusetts.

17. Plaintiff Ashley Mini Mart, Inc. is a Shell franchise with a principal place of business at 129 Ashley Blvd., New Bedford, Massachusetts.

18. Plaintiff Auburn Plaza Shell, Inc. is a former Shell franchisee with a principal place of business at 712 Southbridge St., Auburn, Massachusetts.

19. Plaintiff Tri-Fon Enterprises, Inc. is a Shell franchisee with principal places of business at 461 E. Washington St., N. Attleboro, Massachusetts and 890 S. Washington St., N. Attleboro, Massachusetts.

20. Plaintiff Kamil & Son, Inc. is a Shell franchisee with a principal place of business at 138 Haverhill St., Methuen, Massachusetts.

21. Plaintiff Gaeta Enterprises, Inc. is a Shell franchisee with a principal place of business at 14 Newbury St., Peabody, Massachusetts.

22. Plaintiff Casey's Lynnway Foodmart, Inc. is a Shell franchisee with a principal place of business at 535 Lynnway, Lynn, Massachusetts.

23. Plaintiff Totten Pond Shell, Inc. is a Shell franchisee with a principal place of business at 511 Totten Pond Rd., Waltham, Massachusetts.

24. Plaintiff Hamze Lakeview Service, Inc. is a Shell franchisee with a principal place of business at 1100 Lakeview, Dracut, Massachusetts.

25. Plaintiff Hamze Brothers, Inc. is a Shell franchisee with a principal place of business at 987 Worcester Road, Wellesley, Massachusetts.

26. Plaintiff Hamze Brothers Autocare, Inc. is a Shell franchisee with a principal place of business at 111 North Street, Salem, Massachusetts.

27. Plaintiff Magazine Beach Service, Inc. is a Shell franchisee with a principal place of business at 207 Magazine St., Cambridge, Massachusetts.

28. Plaintiff Hipp Enterprises, Inc. is a Shell franchisee with a principal place of business at 446 Station Ave., S. Yarmouth, Massachusetts.

29. Plaintiff Three K's, Inc. is a Shell franchisee with a principal place of business at 1220 Main St., Tewksbury, Massachusetts.

30. Plaintiff Ange's Service, Inc. is a former Shell franchisee with a principal place of business at 27 Bridge St., Dedham, Massachusetts.

31. Plaintiff JJK Enterprises Inc. (f/k/a Dedham Shell, Inc.) is a Shell franchisee with principal places of business at 2126 Ocean St., Marshfield, Massachusetts and formerly in Pembroke, Massachusetts.

32. Plaintiff Cynthia Karol (d/b/a Pleasant St. Shell) is a Shell franchisee with a principal place of business at 182 Pleasant St., Attleboro, Massachusetts.

33. Plaintiff William Kaufman is a Shell franchisee with a principal place of business at 281 Orchard St., Watertown, Massachusetts.

34. Plaintiff Kelleher Petroleum, Inc. is a Shell franchisee with a principal place of business at 82 River St., Dorchester, Massachusetts.

35. Plaintiff Kanes Shell FM, Inc. is a Shell franchisee with a principal place of business at 380 Southbridge St., Auburn, Massachusetts.

36. Plaintiff Plantation St. Shell, Inc. is a Shell franchisee with a principal place of business at 747 Plantation St., Worcester, Massachusetts.

37. Plaintiff Mina Enterprises, Inc. (d/b/a Mike's Super Shell Service) is a Shell franchisee with a principal place of business at 436 Lancester St., Leominster, Massachusetts.

38. Plaintiff Mac's Shell Service, Inc. is a Shell franchisee with principal places of business at 135 East Main St., Southbridge, Massachusetts and 123 East Main St., Webster, Massachusetts.

39. Plaintiff RAM Corporation, Inc. is a former Shell franchisee with a former principal place of business at 904 Main St., Southbridge, Massachusetts.

40. Plaintiff Akmal, Inc. is a Shell franchisee with a principal place of business at 302 West Broadway, S. Boston, Massachusetts.

41. Plaintiff Constantinos Peides is a Shell franchisee with a principal place of business at 394 Providence Highway, Westwood, Massachusetts.

42. Plaintiff Stephen Pisarczyk is a former Shell franchisee with a former principal place of business at 257 W. Boylston St., W. Boylston, Massachusetts.

43. Plaintiff Sid Prashad (d/b/a Madison Shell) is a Shell franchisee with a principal place of business at 48 Madison St., Worcester, Massachusetts.

44. Plaintiff Windsor Tire Co., Inc. is a former Shell franchisee with a principal place of business at 491 Walpole St., Norwood, Massachusetts.

45. Plaintiff JES Service, Inc. is a Shell franchisee with a principal place of business at 460 King St., Littleton, Massachusetts.

46. Plaintiff Reading Shell & Tire Center, Inc. is a former Shell franchisee with a principal place of business at 110 Main St., Reading, Massachusetts.

47. Plaintiff Terjac, Inc. is a former Shell franchisee with a principal place of business at 122 Boston St., Lynn, Massachusetts.

48. Plaintiff J. Enterprises, Inc. is a Shell franchisee with a principal place of business at 2345 Gar Hwy, Swansea, Massachusetts.

49. Plaintiff John A. Sullivan is a former Shell franchisee with a principal place of business at 141 Front St., Scituate, Massachusetts.

50. Plaintiff Taki's Shell, Inc. is a Shell franchisee with a principal place of business at 145 Spring St., W. Roxbury, Massachusetts.

51. Plaintiff Dedham Square Auto Service, Inc. is a Shell franchisee with a principal place of business at 525 Providence Pike, Dedham, Massachusetts.

52. Defendant Shell Oil Products Company LLC (f/k/a Shell Oil Products Company) is, upon information and belief, a limited liability company duly organized and existing under the laws of the state of Delaware, with its principal place of business of One Shell Plaza, Houston, Texas 77067.

53. Defendant Shell Oil Company is, upon information and belief, a corporation duly organized and existing un-

der the laws of the state of Delaware, with its principal place of business at One Shell Plaza, Houston, Texas 77067. Upon information and belief, at all times relevant, Shell Oil Products Company LLC (f/k/a Shell Oil Products Company) was an authorized agent and/or subsidiary of Shell Oil Company. Hereinafter, Shell Oil Company and Shell Oil Products Company LLC (f/k/a Shell Oil Products Company) may be referred to collectively as "Shell".

54. Defendant Motiva Enterprises, LLC ("Motiva") is, upon information and belief, a Delaware Limited Liability Corporation with its principal place of business at 12700 Northborough, Ste. 100, Houston, Texas 77067. Upon information and belief, Motiva was originally a joint venture of Shell Oil Company Texaco, Inc., Star Enterprises and Saudi Refining, Inc. These four companies transferred their marketing and refining assets east of the Appalachians to Motiva in August 1998. Upon information and belief, Texaco, Inc., and Star Enterprises subsequently divested themselves of any interest in Motiva.

55. This Court has jurisdiction and venue over this matter, as follows:

(a). This matter arises under The Petroleum Marketing Practices Act, 15 U.S.C. § 2805, providing for general federal question jurisdiction, 28 U.S.C. § 1331. Venue is proper in this Court, being a judicial district in which the franchisees conduct (or have conducted) business.

(b). The federal Declaratory Judgment Act, 28 U.S.C. § 2201.

(c). Supplemental jurisdiction under 28 U.S.C. § 1367 over the following pendent and/or ancillary state

law claims: (i) claims under Massachusetts General Laws chapters 93E and 93A; and (ii) claims pursuant to the Massachusetts contract and common law; and

(d). This Court has jurisdiction over the above-referenced state law claims and provisions, in the alternative, pursuant to the federal diversity statute, 28 U.S.C. § 1332. There is complete diversity between all of the Plaintiffs and all of the Defendants in this matter[;] each of the Defendants are Delaware companies with principal places of business in Texas and not in Massachusetts. Plaintiffs are each citizens of the Commonwealth of Massachusetts and the amount in controversy exceeds $75,000.00.

## III. Allegations Of Fact

56. Since the announcement of the formation of Motiva, the Shell franchisee dealers have become targeted for elimination, pursuant to a plan that, on information and belief, is called the "Strategic Marketing Initiative."

57. The Strategic Marketing Initiative, upon information and belief, is contained in a series of documents and executive summaries that set[ ] forth the move to replace the franchisee dealers with company and commission operated stations.

58. The renewal of franchise contracts, as the prior contract term ends, target dealer elimination by:

(a). imposition of oppressive and unconscionable rent increases on the dealers, that standing alone are often enough to force the dealer to either leave the locations, and/or allow the franchisor to change the location to a contractor operated retail outlet ("CORO") or a salary operated retail outlet

("SORO"). The idea behind a "CORO" or "SORO" is to strip the retailers of their protected status as franchisees under federal and state law while giving the company control over the retail pricing at the station;

(b). attempting to illegally force assignees of dealer franchise agreements to take nearly valueless "trial franchises" as that term is defined in the Petroleum Marketing Practices Act, 15 U.S.C. § 2803, as opposed to the regular treatment of unexpired portions of franchise agreements as set forth in 15 U.S.C. § 2801(1)(B)(iii) and enabling Shell/Motiva to utilize its contractual "first refusal right" to match offers to dealers at depressed or fire sale prices, or to remove anyone after one year if they so desire.

(c). attempting to require, as a condition of renewal, that the dealer release Shell from claims arising out of prior franchise relationships, contrary to the Petroleum Marketing Practices Act; and

(d). attempting to define new reasons for franchise termination in the franchise agreements, that are contrary to the Petroleum Marketing Practices Act.

59. The Defendants' regional manager has openly stated to the dealers that many of them would be eliminated within two years.

60. This harsh attitude is also reflected in the provisions of the new franchise contracts themselves, which offend the 1994 Amendments to the Petroleum Marketing Practices Act. Under the Petroleum Marketing Practices Act 15 U.S.C. § 2802(a)(2), Shell is prohibited from failing to renew Plaintiffs['] franchise agreements and

under the 1994 Amendments specifically, 15 U.S.C. § 2805(f), no company, including Shell/Motiva, may condition renewal of the franchise by inserting new franchise provisions that cause Plaintiffs to waive any rights that Plaintiffs have under the Petroleum Marketing Practices Act and otherwise under both Federal and State Law.

61. The Shell franchise agreements contain provisions that purport to release any claims the franchisee may have under any previous agreement.

62. Shell has embarked upon a new system of pricing at CORO's and SORO's that is designed to facilitate dealer elimination and has engaged in other wholesale pricing and manipulation that violate the provisions of law. The most obvious of the dealer elimination tools is the rent, and the failure of Shell to honor its agreement and commitment to plaintiffs that the Variable Rent Program or its equivalent would always be in place. Moreover, Defendants have engaged in a practice of giving [their] CORO's and SORO's as well as other intermediary wholesalers known as "jobbers" a substantial and preferential discount on the wholesale price of Shell gasoline. Upon information and belief, CORO's, SORO's and jobbers purchase Shell gasoline from terminals in Massachusetts at a "rack price" established by Defendants. The rack price paid by CORO's, SORO's and jobbers is substantially lower than the dealer tank wagon ("DTW") price charged by Defendants to Plaintiffs for the same fuel purchased from the same terminal. Because of these higher prices, Plaintiffs are forced to sell their gasoline to consumers at prices that are substantially higher than the retail prices changed by CORO's, SORO's and jobbers. This has caused Plaintiffs' volume of gasoline sales (as well as profits) to decrease.

**The Variable Rent Program**

63. Prior to the late 1990's, Shell sold gasoline, gasoline related products and other products and services that are commonly sold at retail gasoline stations (hereinafter collectively, "gasoline products") to the public in New England almost exclusively through independent franchised retail dealers such as the Plaintiffs. The principal product sold to the public by such dealers was gasoline and diesel fuel, but some dealers also operated convenience markets, car washes and repair services.

64. The dealers have conducted and still conduct their retail operations under written franchise agreements with Shell/Motiva. Such agreements consist of multiple pre-printed documents unilaterally prepared by Shell/Motiva.

65. The franchise agreements are contracts of adhesion whose essential terms were not negotiable in any manner before execution by the dealer franchisees. Pursuant to these contracts, Shell provides the station premises, which the dealer leases under a lease entitled "Motor Fuel Station Lease", or in its most current version, a "Retail Motor Fuel Facility" lease.

66. Shell/Motiva also provided a written form "Dealer Agreement" as a part of the franchise package, which all dealers are required to execute. The latest version of the document is called a Motor Fuel Supply Agreement, under which Plaintiffs purchase Shell branded petroleum products for resale to the public.

67. Before Shell approved Plaintiffs as franchisees, it required many of the prospective franchisee to complete a *pro forma* profit and loss of statement for the proposed location. In New England, such prospective dealer statements were prepared together by the dealer and by Shell's representatives. Shell reviewed each such state-

ment to satisfy itself as to the economic viability of the franchise before entering into a franchise agreement for that station. Such treatments always clearly showed that the dealer's premises rent was calculated according to Shell's Variable Rent Program and this determined the profitability of the dealer's business. The dealers relied on these projections, which were part of their business plans. These business plans so calculated were submitted to financial institutions from whom Plaintiffs obtained loans, and in some instances included the Small Business Administration in undertaking the franchise relationship; Shell knew of the reliance thereon.

68. Gasoline costs and station rents are the largest components of the cost of doing business for a retail gasoline dealer, including the costs imposed upon the Plaintiffs. Shell dealers buy gasoline from their franchisor, Shell/Motiva, which has always by contractual right unilaterally set the prices which the dealers pay for gasoline products. The Shell dealers' written leases include a stated rent that is known as "Contract Rent." That figure is and was set pursuant to a secret formula that remains unknown to the dealers to this day. Shell representatives have expressly agreed and promised that this Contract Rent would not be charged and Plaintiffs[ ] have reasonably relied upon same to their detriment. That this contract rent would not be charged was also established by the course of dealing and course of conduct that took place between the parties.

69. The "Contract Rent" is a figure that through the course of dealing has little meaning other than to serve as the baseline for calculation of the actual rent to be paid under the Variable Rent Program. Dealers simply did not pay the Contract Rent, and Shell and its represen-

tatives encouraged each of the Plaintiffs to ignore the Contract Rent figure.

70. The actual station rents would be charged under the Variable Rent Program by which Shell granted to dealers a credit against the following month's rent, usually at the rate of 4.5 cents for each gallon of motor fuel which the dealer purchased from Shell over a figure known as the "VRP Threshold".

71. The VRP Threshold was set by local Shell management pursuant to a secret formula or guideline, which was often zero. In this way, Shell tied the actual station rents directly to the volume of gasoline being put through the station. This Variable Rent Program resulted in rent being far below the pre-printed "Contract Rent;" and, in fact, when reviewing contracts for renewal of the franchise relationship, Shell dealer representatives would go so far as to chide the Plaintiffs for even looking at the Contract Rent figure.

72. The Variable Rent Program was the foundation of the course of dealing between Shell and the dealers for over 18 years. While Shell has recently attempted to characterize the VRP as a voluntary program, every Shell dealer participated in the program. It was memorialized in various writings as well as through a 18-year course of dealing and, in fact, was not voluntary at all. Indeed, the VRP was such a critical component of the Shell marketing scheme that Shell previously encouraged the dealers to oppose federal and state legislative initiatives on the claim that such legislation, if enacted, would require changes to, or elimination of the VRP.

73. For over 18 years, the dealers received assurances from the highest levels of the marketing department on down to the field sales representatives, that the VRP would always be there for them, or that in the alterna-

tive, a program that would be the equivalent of VRP would be put in place as Shell was very aware that dealers could not pay the "Contract Rent" and survive.

74. These assurances were also given by Shell representatives to Shell's dealer panels, which were groups of dealers that Shell had appointed, regionally and nationally, purportedly to represent all dealers, as well as through general meetings of dealers in the geographic area and through individual communications by Shell representatives to current and prospective dealers[.] Shell kept the minutes of these meetings, and provided written transcripts thereof to the dealer representatives.

75. Other writings reinforce the point that the economic and legal reality was that the VRP was anything but a voluntary short-term program and that Contract Rent did not serve as anything other than a baseline for VRP calculation. For example, Shell also routinely provided to its dealers documents called the "Delivery Platform Summary," which indicated gasoline delivery volumes and changes in those delivery volumes. These documents prominently featured printed "variable rent calculations" which reflected the VRP allowance and calculated the actual (as distinguished from the contract) rent.

76. Shell, through its duly authorized representatives, encouraged and even demanded that the dealers take actions based upon the "VRP assurances and commitments", and engaged in a pattern of misrepresentation with respect to the rent provision. In detrimental reliance upon these representations, the Dealers made substantial investments, including but not limited to:

(a). purchasing the franchise rights at Shell branded stations;

(b). purchasing the franchise rights of dealers that Shell did not like, due to the active encouragement of Shell management;

(c). investing in ancillary business located at the motor fuel marketing premises such as convenience stores, and car washes; and

(d). entering into renewals of the franchise relationship with Shell based upon the misrepresentations with respect to the contract rent, as opposed to taking other actions, such as selling the franchise.

77. In addition, the Dealers adopted a marketing strategy based upon paying "VRP rent" as opposed to "Contract Rent;" it enabled them to sell fuel to the public at prices lower than would be possible if "Contract Rent" was charged.

78. All of these actions were taken in the context of a lengthy course of dealing and course of conduct, with Shell representatives telling the dealers to pay no attention to the Contract Rent, or the written "offers of variable rent program" to the extent it stated that Shell could, at its option, discontinue or modify the program on 30 days notice. There were numerous assurances and commitments that the VRP or its equivalent would be there for them and that the "Contract Rent" was something the Dealers would never have to worry about, and never have to pay as Shell knew that the Dealers could not survive, much less prosper, if the VRP was terminated, and an equivalent program not put in its place. The fact that Defendants had intimate knowledge of the dealers' financial planning and of their actual financial results on a monthly basis, which plans and results reflected the critical role of the VRP rent program in maintaining the dealers' solvency, reinforced the dealers' be-

lief that Defendants would keep their promises about maintaining viable station rents.

79. By using the VRP to tie the station rent directly to the volume of gasoline it delivered to each station, Shell effectively made rent a part of the price it charged the dealers for its gasoline products. The Defendants obtain their revenues from the operation of franchised independent retail Shell stations, primarily from a combination of station rents and gasoline purchase prices and Shell has treated station rents and gasoline sales revenues as interchangeable parts of their revenue stream. The dealers' profitability has in turn been based on the interdependence of reasonable rents and reasonable fuel prices.

80. At all times material hereto, defendants well knew that if the VRP program terminated, the price for gasoline products would become oppressively high and unfair and that the dealers['] profit would erode to such a point so as to force the dealers out of business.

81. By virtue of its status as a joint venture of Shell, Texaco, Star Enterprises and Saudi Refining, Inc., Motiva Enterprises, LLC is charged with knowledge of all that Shell knew and of all commitments Shell made to Plaintiffs.

82. Upon information and belief, Motiva assumed responsibility from Shell for the day-to-day operation of the dealer network on August 1, 1998. Moreover, and upon information and belief, Shell assigned to (and Motiva accepted) all of Shell's rights, obligations and liabilities arising under the franchise agreements.

83. Thereafter, Shell/Motiva informed Plaintiffs and all Shell dealers in Massachusetts, New Hampshire and Rhode Island that it was terminating the Variable Rent Program, effective August 1, 1998. Shell/Motiva then of-

fered dealers a "substitute" gasoline rebate program which, although similar to the VRP, was less advantageous to the Plaintiff dealers.

84. Effective January 1, 2000, Shell/Motiva abandoned the substitute gasoline rebate program, and began doing what it said it would never do and charged full "Contract Rent" or the new "Program Rent" for those dealers whose franchise relationships have come up for renewal. Both of these rent programs were economically oppressive and were not made in good faith and in the normal course of its franchise relationship with the plaintiffs.

85. The new "Program Rent" results in even more unconscionable and egregious rent than Contract Rent. The new rent structure presented by Program Rent is similar to Contract Rent in that it is based solely on information that Shell claims as confidential and proprietary and does not take into account performance-related variables in the computation of the dealers' rent. Upon information and belief, one of the elements considered by Shell/Motiva in establishing the Program Rent is the appraised value of the real estate from which the dealers operate.

86. As a result of the substantial increase in rent, among other things, Plaintiffs are finding it difficult (if not impossible) to continue to operate their franchises. In many cases where the dealers find themselves unable to meet the rent level set by Program Rent, Shell offers a mutual termination of the respective dealer['s] franchise, within which a release is contained that illegally attempts to prevent the dealer from bringing suit or otherwise seeking redress against Shell for its actions. Shell/Motiva have devised this method of requiring full Contract Rent or this new Program Rent for franchise renewals for the purpose of terminating the dealers' franchises and

to absolve Shell/Motiva of liability that unlawfully circumvents the stringent requirements of the Petroleum Marketing Practices Act in an attempt to take back the franchisees in violation of law.

**Rack Rate v. Dealer Tank Wagon**

87. Another means of exerting economic pressure upon Plaintiffs designed to force them out of business is to charge them a wholesale cost for gasoline that is substantially more per gallon than Defendants charge their company operated stations. Plaintiffs, in turn, are forced to sell their fuel to the consumer at prices that are higher than the retail prices charged by the company operated stations. This has caused Plaintiffs' volume of gasoline sales (as well as profit margins from those sales) to decrease.

88. Defendants sell their gasoline directly to their franchise dealers (including Plaintiffs) at a so-called dealer tank wagon ("DTW") price established solely by Defendants. Defendants deliver all gasoline directly to each of the Plaintiffs' stations in delivery trucks which are, upon information and belief, owned and operated by Defendants or, in some cases, by a common carrier.

89. Plaintiffs do not pay the same DTW. That is, they do not pay the same price for the same gasoline shipped from the same terminal by the same carrier. Rather, Defendants gerrymander numerous "price zones" (also know[n] as "pads") throughout the state and reportedly charge dealers within the same zone the same DTW.

90. Defendants[']' ability to establish these price zones comes from [their] standard dealer agreements with each dealer. Those agreements contain an open price term for the sale of gasoline, which requires Shell/Motiva to set the price for the gasoline in good faith.

91. Shell/Motiva have not set the price for gasoline in good faith as evidenced by Shell's/Motiva's discriminatory pricing practices including, without limitation, charging CORO's, SORO's and jobbers a substantially reduced price for gasoline than Shell/Motiva charge Plaintiffs.

92. The difference between Shell's/Motiva's rack price to CORO's, SORO's and jobbers (on the one hand) and DTW to Plaintiffs (on the other), force[s] Plaintiffs to charge their end-users (i.e. their customers) a higher retail cost for the same gasoline that is being sold to the public by the CORO's, SORO's and jobbers, thus giving Defendants' company owned stations a preferential and competitive advantage over Plaintiffs.

93. Defendants cannot reasonably justify the difference between Defendants' rack price and its DTW. Upon information and belief, the cost for manufacturing both is substantially identical as are the delivery costs and the volume ordered.

## IV. CAUSES OF ACTION

### COUNT I

### INJUNCTIVE RELIEF PURSUANT TO THE PETROLEUM MARKETING PRACTICES ACT

94. The plaintiff dealers repeat and incorporate by reference paragraphs 1-93 as if full[y] set forth herein.

95. Plaintiffs are franchised dealers of motor fuel in a contractual relationship with Shell, a refiner of motor fuel, as defined by the Petroleum Marketing Practices Act, 15 U.S.C. § 2801, *et seq.*

96. By terminating the Variable Rent Program, among other things, and charging Plaintiffs the unconscionably high rents of the Contract Rent and Program

Rent structures, Shell has constructively terminated the Plaintiffs' franchises.

97. Pursuant to the standards set forth by the Petroleum Marketing Practices Act, 15 U.S.C. § 2801, the individual dealers seek a preliminary and permanent injunction (i) preventing the imposition of either full "Contract Rent" or the "Program Rent" and (ii) ordering the reinstatement of the VRP (or a similar rent credit program).

98. The injunctive relief is requested on the grounds that:

(a). the dealers' franchises have been constructively terminated by Shell's termination of the Variable Rent Program or a similar alternative;

(b). there exists sufficiently serious questions going to the merits to make such questions a fair ground for litigation; and

(c). the hardship suffered by Shell by reinstating a rent program that it maintained for over 18 years would be minimal compared to the egregious harm that will occur to the dealers, that being the end of their businesses and livelihood, if such preliminary injunction is not granted.

**COUNT II**

**VIOLATION OF THE PETROLEUM MARKETING PRACTICES ACT**

99. The plaintiffs repeat and incorporate by reference paragraphs 1-98 as if full[y] set forth herein.

100. Plaintiffs are franchised dealers of motor fuel in a contractual relationship with Shell, a refiner of motor fuel, as defined by the Petroleum Marketing Practices Act, 15 U.S.C. § 2801, *et seq.*

101. The Petroleum Marketing Practices Act strictly regulates the requirements for a refiner of motor fuel, such as Shell, to terminate the franchises of dealers of motor fuel, such as Plaintiffs.

102. By terminating the Variable Rent Program and instituting the unconscionable rents under the Program Rent structure, among other things, in the face of its express and implied promises that it would not do so, Shell has and is terminating the Plaintiffs' franchises in violation of the Petroleum Marketing Practices Act.

103. By terminating the Variable Rent Program and instituting the unconscionable rents under the Program Rent structure, in the face of its express and implied promises that it would not do so, Shell has and is attempting to convert the dealers' franchises into CORO's or SORO's in violation of the Petroleum Marketing Practices Act[,] 15 U.S.C. § 2802(b)(3)(A)(ii).

104. By including waiver and release clauses in its retail lease and service agreements, Shell has and is violating the Petroleum Marketing Practices Act, 15 U.S.C. § 2805.

105. As a result of Shell's violation of the Petroleum Marketing Practices Act aforesaid, Plaintiffs have and continue to sustain monetary damages.

106. As a result of Shell's violations of the Petroleum Marketing Practices Act aforesaid, Plaintiffs are entitled to, among other things, compensatory and punitive damages, together with interest, costs, and attorney's fees, for all of the above violations and the loss of value with respect to Plaintiffs' dealer franchises.

## COUNT III
## VIOLATION OF MASSACHUSETTS GENERAL LAWS CHAPTER 93A

107. The Plaintiffs repeat and incorporate by reference paragraphs 1-106 as is full[y] set forth herein.

108. Shell is engaged in trade or commerce as defined by Massachusetts General Laws, Chapter 93A.

109. Shell's/Motiva's efforts to force the Plaintiffs out of business by placing economic pressures on the Plaintiffs which include, among other things, the imposition of unconscionable rents and charging Plaintiffs substantially higher wholesale costs for motor fuel than CORO's, SORO's and jobbers, constitute unfair and/or deceptive acts, as prohibited by the terms of Chapter 93A.

110. Plaintiffs have been damaged by Defendants[']knowing and willful violation of M.G.L. c. 93A §§ 2 & 9.

111. Plaintiffs seek monetary damages, compensatory and punitive, together with interest, costs, and attorney's fees, for all of the above violations and the loss of value with respect to Plaintiffs' dealer franchises.

## COUNT IV
## VIOLATION OF THE MASSACHUSETTS REGULATION OF DEALERS' AGREEMENTS FOR THE SALE OF GASOLINE

112. The Plaintiffs repeat and incorporate by reference paragraphs 1-111 as if full[y] set forth herein.

113. Shell is a supplier as defined by Massachusetts General Laws, Chapter 93E.

114. Shell's acts, including, without limitation, expressly misrepresenting to the dealers that the Variable Rent Program or a similar rent program would always be kept in place, constitute failures on the part of Shell to

make requisite disclosures pursuant to Massachusetts General Laws, Chapter 93E, Section 3, *et seq.*

115. Shell's acts, including, without limitation, expressly misrepresenting to the dealers that the Variable Rent Program or a similar rent program would always be kept in place, constitute unfair methods of competition and/or unfair and deceptive practices or acts as prohibited by Massachusetts General Laws, Chapter 93E, Section 5, *et seq.*

116. Plaintiffs seek monetary damages, compensatory and punitive, together with interest, costs, and attorney's fees, for all of the above violations and the loss of value with respect to Plaintiffs' dealer franchises.

**COUNT V**

**BREACH OF CONTRACT**

117. The Plaintiffs repeat and incorporate by reference paragraphs 1-116 as if full[y] set forth herein.

118. The elimination of the Variable Rent Program and its replacement program constitute a breach of contract.

119. Plaintiffs seek monetary damages, compensatory and punitive, together with interest, costs, and attorney's fees, for all of the above violations and the loss of value with respect to Plaintiffs' dealer franchises.

**COUNT VI**

**BREACH OF CONTRACT - OPEN PRICE TERM**

120. The Plaintiffs repeat and incorporate by reference paragraphs 1-119 as if full[y] set forth herein.

121. Plaintiffs' franchise agreements with Shell/Motiva contain an open price term for the sale of gasoline, which requires Shell/Motiva to set the price for the gasoline in good faith.

122. Shell/Motiva have not set the price for gasoline in good faith as evidenced by Shell's Motiva's discriminatory pricing practices including, without limitation, charging CORO's, SORO's and jobbers a substantially reduced price for the same gasoline than Shell/Motiva charge Plaintiffs.

123. The difference between Shell's/Motiva's rack price to CORO's, SORO's and jobbers (on the one hand) and DTW to Plaintiffs (on the other), force[s] Plaintiffs to charge their end-users (i.e. their customers) a higher retail cost for the same gasoline being sold to the public by the CORO's, SORO's and jobbers thus giving Defendants' company owned stations a preferential and competitive advantage over Plaintiffs for the same product. The higher prices charged to Plaintiffs result in lost customers, who apparently turn to company operated stations with lower prices.

124. As a result of Shell's/Motiva's breaches aforesaid, Plaintiffs have been (and continue to be) damaged.

**COUNT VII**

**BREACH OF IMPLIED WARRANTY OF GOOD FAITH AND FAIR DEALING**

125. The Plaintiffs repeat and incorporate by reference paragraphs 1-124 as if full[y] set forth herein.

126. The aforementioned franchise agreements contained an implied warranty of good faith and fair dealing which provides that neither party shall do anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.

127. As a result of Defendants' conduct aforesaid, Defendants have breached the Covenant of Good Faith and Fair Dealing.

128. As a direct result of Defendants' breach, Plaintiffs have sustained (and will continue to sustain) damages.

129. Plaintiffs seek monetary damages, compensatory and punitive, together with interest, costs, and attorney's fees, for all of the above violations and the loss of value with respect to Plaintiffs' dealer franchises.

**COUNT VIII**

**PROMISSORY ESTOPPEL**

130. The Plaintiffs repeat and incorporate by reference paragraphs 1-129 as if full[y] set forth herein.

131. In order to induce the plaintiff dealers to enter into or renew their franchise agreements with Shell, the company promised and agreed that the Variable Rent Program or a similar alternative would always be maintained by Shell.

132. Pursuant to that promise, the plaintiff dealers made substantial investment, pecuniary and otherwise, into the establishment and growth of their respective franchises.

133. Wherefore equity requires that Shell be stopped from now terminating the Variable Rent Program or a similar alterative.

**COUNT IX**

**DECLARATORY JUDGMENT**

134. The Plaintiffs repeat and incorporate by reference paragraphs 1-133 as if full[y] set forth herein.

135. An actual controversy exists between Plaintiffs, on the one hand, and Shell, on the other hand, as to whether Shell violated the Petroleum Marketing Practices Act and/or the Plaintiffs' franchise agreements when it (i) eliminated the VRP and failed to replace it

with a similar substitute rent program, and (ii) included waiver and release clauses in its retail lease and service agreements.

136. In accordance with the provisions of the Federal Declaratory Judgment Act, 28 U.S.C. § 2201, declaratory relief is requested that this Court enter a judgment that the actions of the Defendants as above described in this complaint have violated the provisions of the Petroleum Marketing Practices Act.

## V. Relief Requested

**WHEREFORE**, the Plaintiffs respectfully request[ ] the following relief:

1. That, as to Count I, the Court, in accordance with 15 U.S.C. § 2801, *et seq.* and Fed. R. Civ. P. 65, issue a temporary restraining order and, following a hearing, issue a preliminary injunction affirmatively requiring and ordering that:

(a). Shell Oil Products Company, LLC, Shell Oil Products Company, Shell Oil Company, Motiva Enterprises, LLC and their respective successors, agents and affiliates are ordered to re-institute the Variable Rent Program (or similar rent reduction program); and

(b). Shell Oil Products Company, LLC, Shell Oil Products Company, Shell Oil Company, Motiva Enterprises, LLC and their respective successors, agents and affiliates are enjoined from charging "Contract" or "Program" rent.

2. That, as to Count II, this Court enter a judgment in favor of Plaintiffs and against [ ] Shell Oil Products Company, LLC, Shell Oil Products Company, Shell Oil Company, and Motiva Enterprises, LLC and award Plaintiffs their actual damages (includ-

ing, without limitation, lost profits and the diminution of the value of [their] business), exemplary damages, treble damages, costs, interest, attorney's fees, expert witness' fees and all other damages recoverable under the Petroleum Marketing Practices Act, 15 U.S.C. § 2801, *et seq.*

3. That, as to Count III, this Court enter a judgment in favor of Plaintiffs and against [ ] Shell Oil Products Company, LLC, Shell Oil Products Company, Shell Oil Company, and Motiva Enterprises, LLC and award Plaintiffs their actual damages (including, without limitation, lost profits and the diminution of the value of [their] business), exemplary damages, treble damages, costs, interest, attorney's fees, expert witness' fees and all other damages recoverable under law.

4. That, as to Count IV, this Court enter a judgment in favor of Plaintiffs and against [ ] Shell Oil Products Company, LLC, Shell Oil Products Company, Shell Oil Company, and Motiva Enterprises, LLC and award Plaintiffs their actual damages (including, without limitation, lost profits and the diminution of the value of [their] business), costs, interest, attorney's fees all other damages recoverable under law.

5. That, as to Counts V-VIII, this Court enter a judgment in favor of Plaintiffs and against [ ] Shell Oil Products Company, LLC, Shell Oil Products Company, Shell Oil Company, and Motiva Enterprises, LLC and award Plaintiffs damages, costs, interest, attorney's fees all other damages recoverable under law.

6. That, as to Count IX, this Court enter a declaratory judgment in favor of Plaintiffs and against [ ]

Shell Oil Products Company, LLC, Shell Oil Products Company, Shell Oil Company, and Motiva Enterprises, LLC pursuant to 28 U.S.C. 2201, *et seq.* declaring and adjudging that the elimination of the Variable Rent Program violates the terms of the parties['] franchise agreement and the Petroleum Marketing Practices Act, 15 U.S.C. § 2801, *et seq.*

7. That the Court grant other such further relief as it deems just and appropriate.

PLAINTIFFS DEMAND A TRIAL BY JURY ON ALL CLAIMS SO TRIABLE.

Respectfully submitted,
MAC'S SHELL SERVICE, INC., et. al.
By their attorneys,

_____

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617-310-6000

DATED: December __, 2002

**UNITED STATES DISTRICT COURT**
**DISTRICT OF MASSACHUSETTS**

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CIVIL ACTION NO. 01-11300-RWZ

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*IN RE* SHELL OIL PRODUCTS CO.
DEALER FRANCHISEE LITIGATION

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**ORDER**

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**January 13, 2003**

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ZOBEL, D.J.

In accordance with the agreement of the parties at the Status Conference held on December 12, 2002, the Court selects the following plaintiffs for the first trial.

1. J & M Avramidis, Inc. (d/b/a Walpole Shell)
2. Three K's, Inc.
3. Cynthia Karol (d/b/a Pleasant St. Shell)
4. Mac's Shell Service, Inc.
5. RAM Corporation, Inc.
6. Akmal, Inc.
7. Stephen Pisa[r]czyk
8. Sid Prashad (d/b/a Madison Shell)
9. Reading Shell & Tire Center
10. John A. Sullivan

It is so ordered.

[January 13, 2003]
DATE

/s/ Rya W. Zobel
RYA W. ZOBEL
UNITED STATES DISTRICT JUDGE

**UNITED STATES DISTRICT COURT**
**DISTRICT OF MASSACHUSETTS**

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CIVIL ACTION NO. 01-11300-RWZ;
MDL DOCKET NO. 1461

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FRANCIS MARCOUX, ET AL.,

v.

SHELL OIL PRODUCTS CO., INC., ET AL.

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**MEMORANDUM OF DECISION**

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**October 22, 2003**

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ZOBEL, D.J.

Plaintiffs, Shell gas station franchisees, are suing defendants Shell Oil Products Company, Motiva Enterprises, and Shell Oil Company for numerous causes of action based on defendants' termination of the Variable Rent Program ("VRP") and an equivalent substitute program, both of which allowed franchisees to offset monthly rents with the proceeds of gasoline sales. The VRP was eliminated on August 1, 1998, and the substitute program ended on January 1, 2000. Plaintiffs, acting as an unincorporated organization, filed a predecessor action about six months later. See *Tsaniklides v. Shell Oil Products Co., Inc.*, No. 00-cv-11295. After the Court determined that the plaintiffs' organization did not have standing, the franchisees voluntarily dismissed their Complaint and filed the present action on July 27, 2001. Since 2000, all

plaintiffs have signed new lease agreements with defendants.

As a result of the VRP's termination, plaintiffs allege that their rents have increased between two- and six-fold. According to plaintiffs, the rent hikes were designed to force franchisees out of business and to minimize the cost to Shell of converting the gas stations into company-owned retail outlets. On July 30, 2003, plaintiffs filed a motion for a preliminary injunction pursuant to the Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. § 2805(b)(2). Plaintiffs propose that the injunction restore their rent payments to July 1998 levels, plus a 5% annual increase, or at the very least to the levels set by the substitute program that replaced the VRP until January 2000.

In order to be entitled to preliminary injunctive relief under the PMPA, a franchisee must show "(i) the franchise of which he is a party has been terminated or the franchise relationship of which he is a party has not been renewed, and (ii) there exist sufficiently serious questions going to the merits to make such questions a fair ground for litigation." 15 U.S.C. § 2805(b)(2)(A). Additionally, the balance of the hardships must favor the franchisee over the franchiser. *Id.*, § 2805(b)(2)(B). The present case raises difficulties on the first prong because defendants did not terminate or fail to renew any of plaintiffs' leases. All plaintiffs have signed new lease agreements since the end of the VRP and VRP substitute. The existence of new lease agreements in itself is not necessarily fatal to plaintiffs' position. "[A] franchisee who signs a successor contract under protest and promptly seeks to invoke its rights under the PMPA . . . has not 'renewed' the franchise relationship so as to bar relief under the PMPA." See *Pro Sales, Inc. v. Texaco, U.S.A.*, 792 F.2d

1394, 1399 (9th Cir. 1986). In *Pro Sales* the plaintiff signed a successor lease but only did so under protest, immediately filed suit under the PMPA, and sought a temporary restraining order. By contrast, the franchisees in this case have waited years before seeking preliminary injunctive relief. The lengthy period of time that elapsed before plaintiffs filed this motion not only calls into question whether the first prong of § 2805(b)(2) is satisfied, but more important, it makes a preliminary injunction inappropriate at this stage in the litigation. Granting injunctive relief in order to turn the clock back to July 1998 or to a time before January 2000 would exceed the Court's power "to preserve the status quo between the parties during the pendency of the litigation." *Dersch Energies, Inc. v. Shell Oil Co.*, 314 F.3d 846, 863 (7th Cir. 2002).

One of the grounds plaintiffs cite for the necessity of a preliminary injunction is that defendants' repeated delays in producing discovery have prolonged this litigation and, by extension, plaintiffs' payments of ruinously high rents. Along with the motion for injunctive relief, plaintiffs have filed two motions relating to discovery: a motion to compel answers to interrogatories and for sanctions and a motion for entry of default judgment and for monetary sanctions. Defendants, in turn, have filed a cross-motion for sanctions. Plaintiffs' motions are not without merit; the record reflects that defendants have been exceedingly slow in responding to plaintiffs' interrogatories. Plaintiffs served defendants with interrogatories on January 16, 2003. Despite repeated requests for responses to the interrogatories, answers were not served until late April. After plaintiffs complained in an April 30 letter that the answers were deficient, defendants agreed in a May 23 letter to supplement certain

interrogatories starting on or before June 6, 2003. Those supplemental answers did not come until September 12—after plaintiffs filed [their] two discovery-related motions, and after this Court on August 7 ordered defendants to live up to their agreement of May 23. These types of delays are inexcusable.

Accordingly, plaintiffs' motion for injunctive relief is denied. Plaintiffs' motion to compel is allowed to the extent defendants have not already responded to plaintiffs' interrogatories. Plaintiffs' motion for entry of default judgment is denied without prejudice. Plaintiffs' motions for sanctions are allowed in the amount of plaintiffs' attorneys' fees and costs for preparing the two discovery motions. Counsel shall file the requisite affidavits. Defendants' motion for sanctions is denied.

_____ /s/ Rya W. Zobel

DATE RYA W. ZOBEL
UNITED STATES DISTRICT JUDGE

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MASSACHUSETTS**

| | |
|---|---|
| *IN RE* SHELL OIL PRODUCTS CO. DEALER FRANCHISEES LITIGATION | [FILED 07/09/2004]<br>MDL Docket No. 1461<br>United States District Court for the District of Massachusetts Civil Action No. 01-CV-11300<br>United States District Court for the District of New Hampshire Civil Action No. 01-CV-430<br>United States District Court for the District of Rhode Island Civil Action No. 01-CV-514T |

## AFFIDAVIT OF ROBERT WEINER

Robert Weiner deposes and states under oath as follows:

1. I am an attorney-at-law licensed to practice in the Commonwealth of Massachusetts. I am also a principal at the Law Offices of Robert E. Weiner, located at One Longfellow Place, Boston, Massachusetts. I was formerly counsel to the Plaintiff Lessee-Dealers in connection with the above referenced matter. Before that, I represented each of the individual Lessee-Dealers through an unincorporated association known as the United Shell Dealers of New England in a related action captioned *Tsanikilides et al. v. Shell Oil Products Company, Inc.*, Civil Action No. 00-11295 (RWZ). The statements of fact contained herein are made upon my own personal knowledge.

2. Attached hereto as **Exhibit "A"** is a true and accurate copy of a February 25, 2000 letter that I sent to

Brett Marks, Assistant General Counsel, Equiva Services on behalf of the United Shell Dealers of New England.

**SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS 1st DAY OF JULY, 2004.**

/s/
Robert Weiner

[Service Stamp 7/9/04]

Law Offices of
ROBERT E. WEINER
One Longfellow Place, Suite 5489
Boston, Massachusetts 02114
Telephone (617) 237-4283 Facsimile (617) 727-7235

February 25, 2000

Brett Marks, Esq.
Assistant General Counsel – Branded Operations
Equiva Services, Inc.
1 Shell Plaza
Houston, TX 77601

By Confirmed Facsimile and First Class Mail, Postage Prepaid

Dear Mr. Marks:

We are writing on behalf of the United Shell Dealers of New England, a group that counts a substantial majority of the Motiva retailers in Massachusetts and neighboring states as members. Specifically, we are writing with regard to the tactics employed by Motiva in relation to the leases currently being offered to our clients, as well as the content of the contracts themselves.

First, we note that there is undue pressure being placed upon the dealers to execute the contracts without meaningful review in a short time frame that leads one to question exactly what Motiva's motives are. The recent expansion in the New England area of company and contractor operated stations seems to strongly indicate[ ] that unless stopped, the carnage of Texaco dealers that occurred when the ORO concept was rolled out will repeat itself.

As you know, it is our position that several of the provisions of these new contracts violate the governing law of the dealer home state and that the release language as well as the "trial franchise upon assignments" provisions violate the PMPA. With respect to the release provision, despite the "clarification" of the meaning of the language, described by your company as an agreement to disagree, it is our position that such language is illegal and unenforceable under the PMPA and governing state law, and represents nothing more than a transparent attempt to reverse the defeat suffered by Shell and Texaco in opposing the 1994 PMPA Amendments.

Notwithstanding our protest and reservations, we have advised our clients to execute the agreements because, as noted by the New Jersey Supreme Court in *Shell Oil v. Marinello*, the dealers have no choice but to sign on the dotted line or risk losing their primary means of support for their families.

Furthermore, notwithstanding our clients[']' execution of the agreements, we are putting your client on notice that we do not waive and expressly reserve all rights and causes of actions our clients have under any and all applicable law, including those arising out of the franchise agreements that may have existed in the past. Our clients will, of course, live up to the terms of the contracts until such time that a court of competent jurisdiction determines the legality, or more accurately, the lack thereof, of the unconscionable and oppressive terms being foisted upon the dealer community.

It is regrettable that a company that we once praised for its positive dealer relations before the U.S. Congress and other legislative bodies has taken what our clients view as a 180 degree turn for the worse.

It is our hope that at some point, meaningful dialogue between those with decision making authority can occur and a win-win solution can be arrived at. Nevertheless, until that occurs, we are constrained to take all legal and political steps necessary to defend the men and women who have invested everything in their locations. Kindly direct all future communications on this matter to the undersigned.

Very truly yours,

/s/

Robert E. Weiner
Dimitri "Jim" Daskal

# UNITED STATES DISTRICT COURT
# DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 01-11300-RWZ

FRANCIS MARCOUX, ET AL.,

v.

SHELL OIL PRODUCTS CO., LLC, ET AL.,

## MEMORANDUM OF DECISION

**October 25, 2004**

ZOBEL, D.J.

For many years, Shell Oil Company and Shell Oil Products Company (together, "Shell") maintained the Variable Rent Program (the "VRP") which allowed Shell gas station franchisees to offset monthly rents with certain of the proceeds of gasoline sales. On August 1, 1998, Shell terminated the VRP and assigned responsibility for daily operations of the franchisee network to Motiva Enterprises, LLC ("Motiva"). A substitute rent subsidy program established by Motiva continued to defray rental costs until its termination by Motiva on January 1, 2000. The elimination of these programs caused rents owed by the Shell franchisees to increase two- to six-fold and, according to the franchisees, constituted a violation of various federal and state laws. Plaintiffs in this case, the franchisees, contend that defendants Shell and Motiva endeavored to convert the gas stations into company-owned retail outlets by forcing the franchisees out of

business and thereby violated the Petroleum Marketing Practices Act ("PMPA") and several Massachusetts state laws regarding consumer protection, gasoline regulation and contract law.

Acting as an unincorporated organization, plaintiffs filed an initial claim about six months after elimination of the substitute rent subsidy program. *See Tsaniklides v. Shell Oil Products Co., Inc.*, No. 00-cv-11295. After the Court determined that the plaintiffs' organization did not have standing, the franchisees voluntarily dismissed their Complaint and filed the present action on July 27, 2001.

Defendants now seek summary judgment and have filed three separate motions. The first motion (document #216 on the docket) asserts that a subset of plaintiffs executed franchise termination agreements that include general releases of all claims against defendants, retained benefits received as a result of these releases and failed to repudiate the releases within a reasonably prompt period of time. Plaintiffs argue that they signed these releases under conditions of duress and should not be bound by these terms of release. Whether duress existed depends on the relevant facts. *See, e.g., Shell Oil Co. v. Hennessy*, 639 F. Supp. 626, 628 (D. Mass. 1986) (finding that unconscionability as "predicated on unequal bargaining power . . . must be determined on a case by case basis"). Because the facts regarding plaintiffs' claim are in dispute, this motion is denied.

In the second motion (document #225 on the docket), defendants argue that the PMPA applies only to terminations or non-renewals of franchise agreements, and that plaintiffs' franchise agreements were neither terminated nor non-renewed. Defendants argue specifically that they extended the franchise agreement with plaintiff Stephen Pisarc[zy]k and did not terminate or non-renew

this relationship. As the First Circuit has recognized the theory of constructive termination under the PMPA, whether the elimination of rent subsidies following Shell's assignment of the franchises to Motiva constitutes constructive termination depends in part on resolution of certain facts presently in dispute. *See Riverdale Enterprises Inc., et al., v. Shell Oil Co*, 41 F. Supp. 2d 56, 61-62 (1st Cir. 1999) (stating the factors that a franchisee must establish in order to show constructive termination). Defendants' additional argument for summary judgment against plaintiff Three K's similarly relies upon facts in dispute regarding the appropriate interpretation of Mr. Abdul Kafal's testimony on behalf of Three K's. Accordingly, the second motion is denied.

Defendants' final motion (document #262 on the docket) identifies several grounds for summary judgment. The first ground opposes plaintiffs' Counts III through VIII on the basis that the PMPA preempts the state law claims asserted in these Counts. The First Circuit has taken a restrictive view of the PMPA preemption clause as preempting only those state statutes that interfere with a franchise termination "that would otherwise be valid under the PMPA." *Esso Standard Oil Co. v. Dept. of Consumer Affairs*, 793 F.2d 431, 434 (1st Cir. 1986). For example,"[s]tate regulation that may affect the profitability of a non-terminated franchise, but does not preclude the franchisor's ability to terminate the franchise relationship, is outside the sphere Congress sought to occupy in enacting the PMPA." *Esso*, 793 F.2d at 435. Although defendants argue that the state statutes cited by plaintiffs in Counts III through VIII are "intimately bound" with the grounds alleged for constructive termination, defendants do not demonstrate how these stat-

utes actually qualify franchisors' rights to terminate or non-renew as permitted by [the] PMPA.

Defendants next challenge the timeliness of plaintiffs' claims as based on underlying events that fall outside the permissible time frame for statute of limitations under the PMPA. This Court previously observed that "[v]iewing the facts as stated in the Amended Complaint in a light most favorable to the plaintiffs, the statute of limitations for the PMPA claims began to run on January 1, 2000." *Marcoux v. Shell Oil Products Co., Inc. and Motiva Enterprises, LLC*, 2002 WL 31256197, *1 (2002). It is unclear why defendants continue to raise this argument. The third motion also argues that the termination agreements executed by certain plaintiffs comply with the PMPA requirements for legal termination of a franchise relationship and thus should be treated as valid, binding terminations. As noted with respect to defendants' first motion, whether the certain plaintiffs executed these termination agreements under circumstances of duress remains in dispute. Regarding plaintiffs Three K's and Stephen Pisarczyk, however, defendants observe that the termination agreements in question were executed in 1999, before occurrence of the events in January of 2000 giving rise to this lawsuit. Plaintiffs have not demonstrated how the allegations of duress for these two plaintiffs might be tied to the events underlying this lawsuit. Summary judgment is thus granted as to these two plaintiffs.

Accordingly, defendants' third motion for summary judgment is allowed as to plaintiffs Three K's and Stephen Pisarczyk. The remaining motions are denied.

_____ /s/ Rya W. Zobel

DATE RYA W. ZOBEL
UNITED STATES DISTRICT JUDGE

**UNITED STATES DISTRICT COURT**
**DISTRICT OF MASSACHUSETTS**

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No. 1:01-CV-11300-RWZ

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FRANCIS MARCOUX, et al.,
*Plaintiffs,*

vs.

SHELL OIL PRODUCTS, et al.,
*Defendants.*

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Tuesday, November 16, 2004 (Day II)

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* * * * *

[5] CYNTHIA KAROL

* * * * *

[6] Q. * * * [W]hat is your occupation and what's your husband's occupation?

A. I operate the service station located on Pleasant Street in Attleborough and my husband works for the commuter rail.

* * * * *

Q. And the service station that you refer to, is that a Shell station?

A. It is a Shell-owned location.

* * * * *

[24] Q. Who did you meet with?

A. Dennis Neilson.

Q. And what did Mr. Neilson say to you?

THE COURT: Who was Mr. Neilson?

THE WITNESS: That's what I was just explaining.

A. Dennis was a territory manager, I believe. That was his title. I know that he was above my territory sales representative, who was also present and in and out at that time.

* * * * *

Q. What did you say to him and what did he say to you?

A. During a rent increase, I was concerned, and I mentioned to him that it does say that they could terminate the VRP. I [25] said, "If the VRP were terminated, I could never pay those rents." Now, looking at the rents, as I had operated previously, I would quickly view that list up and down and think—

Q. What did he say to you?

A. I was thinking I was going to pay about a third, not the entire thing.

* * * * *

Q. What did you ask Mr. Neilson, if anything, about the Variable Rent Program at the time you signed this?

A. I asked, "Do I have to worry about the Variable Rent Program ever being terminated?"

Q. Why did you ask him that?

[26] A. Because I had gone into Shell expecting to pay somewhere around $1,100 total rent, net rent. That's what my expectation was. I did realize inflation comes along and things raise. Even after paying a third of that increased list, I'm still looking at almost double rent. So I certainly wouldn't want to go much above that. I had to count on the fact that the VRP is going to be in place.

Q. So prior to your getting your first lease, you were paying roughly somewhere less than $2,000 in rent?

A. Yes.

Q. Okay. And then the first lease says your rent is going to be $6,350?

A. Right. So I needed to know whether I was looking at about a third of that, in actuality. That's what I needed to confirm. And having so many years ahead, month by month—

MR. BENNER: Objection.

THE COURT: Hold it, Ms. Karol. So [that's] what you said to him and then what did he say, if anything?

A. He said the VRP would never be discontinued. It's not going anywhere. That doesn't mean anything. If it did, it would put all the dealers out of business and Shell couldn't possibly run all these operations at once. That was said to me and I remembered it over and over again as the years followed.

* * * * *

[27] Q. Did you believe what he told you?

A. I completely, confidently, believed what he told me.

Q. And did you sign the lease or what did you do in reliance upon what you were told?

A. I signed the lease and I proceeded, in the following years, to try to grow my business, to try to grow the garage business, to spend money, and to expect—in expectance that the rent was affordable, I did spend other money trying to grow the business.

* * * * *

[49] Q. Ms. Karol, you continue to own and operate the Shell station today?

A. Today, I do.

* * * * *

[50] Q. * * * And how have you been able to continue—and you've been paying the rent since 2000?

A. Yes, I have.

Q. And how have you been able to—

A. Well, for one thing, my next lease came in slightly lower.

Q. In terms of what you were paying in 2000?

A. Right.

Q. That was after you got involved with a lawyer?

A. Yes.

Q. Okay. And was it after a lawsuit was filed?

A. Yes. At that time, when I received the new lease, I also asked, as you can see, the first sentence in my letter that I wrote to them, I asked what the new lease looks like. I wanted to know ahead of time. I didn't want to know the day that I signed the lease. I wanted to know ahead of time so that I could know if we had to move, if we had to bail out, if I had to file bankruptcy.

* * * * *

[52] Q. * * * I've put on the screen a chart showing the gallons that you've sold, you know, since 1997. Ms. Karol, um, just generally in the last few years, has your—the amount of gasoline that you sell been impacted by the rent that you're paying?

A. Yes, I believe it's had an impact.

Q. And how has it had an impact?

A. I think that the higher the price of gasoline, you make less money. And when you make less money, it's harder

to pay the rent. And I do have a need to make more money. And also, even just the changes in credit cards have been phenomenal.

* * * * *

[66] Q. Do you own this business as a sole proprietorship?

A. Yes.

Q. It's not a corporation?

A. No.

Q. And therefore, have you personally borrowed or taken monies and put it into the business in order to maintain the business over the last three or four years? * * * What is the magnitude of your own personal funds since the elimination of the rent subsidy program?

* * * * *

A. Um, home equity loans in excess of $50,000. I have a loan with Bristol County Savings for $20,000. $15,000 at Citizens Bank. Along with that, putting in CDs and IRAs and all sorts [67] of things where I've borrowed money from my children and paid that back. Just living month to month where [I can] get the money at this time, honestly.

* * * * *

THE COURT: How much money did you borrow to put into the business?

* * * * *

A. Total borrowed is in excess of $100,000.

Q. And did some of those funds come from—did you also have to cash any retirement funds?

* * * * *

A. Yes.

* * * * *

Q. And what is the magnitude of those funds that you put into the business?

* * * * *

A. I think about—altogether from the beginning, about $40,000.

* * * * *

[85] CROSS-EXAMINATION BY MR. BENNER:

* * * * *

[86] Q. Ms. Karol, let me represent to you that this is a summary that's been prepared of you[r] statement of income and expenses for the year 1994 through 2003 based upon the financial statements that you submitted to us. And so what I would like to do first is cover the issue of net income. * * *

You note that in 1994, your net income was $60,112?

A. Yes.

Q. And that's the amount that was left over after the operation of your station for your own purposes, your own use, correct?

A. Yes.

Q. And that was the last year prior to you taking the station over for yourself, correct?

A. Yes.

Q. And that was when you operated the station together with your husband?

A. Yes.

Q. The first year that you operated the station on your own was 1995, correct?

A. Yes.

[87] Q. And the net income for that year was $30,446, do you see that?

A. Yes. Yes.

* * * * *

Q. So the year you took over the operation, your net income dropped in half, correct?

A. Uh-huh.

Q. And you testified earlier to a valuation of your business at the time of your divorce. I assume the valuation of the business included what net profit the business earned in 1994, correct?

A. Uh-huh.

Q. So to the extent that the net profit of the business was less in later years, the value of the business would go down, correct?

A. Correct.

Q. Okay. So in 1995, you earned a total of $30,446. In 1996, a total of $25,710. In 1997, a total of $28,832. And that was the last year before the VRP was actually terminated—last [88] full year before the VRP was terminated in 1998, correct?

A. Correct.

Q. And the year that the VRP was terminated, you earned $29,000 in 1998. In 1999, you earned $39,683. And that was the year that the STIP program was in?

A. Correct.

Q. And you considered that—you testified that you were dissatisfied with the STIP programs during your direct examination; did you not?

A. Correct.

Q. But your income went up by $14,000 in '99; did it not?

A. Correct.

Q. Okay. And then in 2000 which is the year that you say was a difficult year, your income was $8,188?

A. Correct.

Q. But this actually shows that the business, although I agree, I recognize that the income went down, there was a net income out of the business, there wasn't a loss that was shown by the business in that year, correct?

A. Correct.

Q. Okay. As we go forward to 2001. We go back to $38,568 as your net income. And then 2002, $22,952; and 2003, $28,932. Now, what I would next like to focus on—so let me just ask. You would agree with me, would you not, that your net income in 2001 when you were paying the new rent was actually greater [89] than any of the years during which you operated the station on your own prior to 1998, correct?

A. Correct.

* * * * *

[113] Q. Okay. If I could have the last page of the diary, please. Now, could you tell from the top entry which is not complete, could you tell from the top entry when it is that this entry was made? And this page looks like it would have been in the year 2000.

A. Yup, the end of 2000.

Q. The end of 2000. And is it true that in the last entry in your diary at the end of the 2000, it says, "I stopped writing because the new lease looked lower and gave

hope, also busy, also treated better due to lawsuit maybe"?

A. Yes.

Q. So at the end of 2000, it was your belief that there was hope because the lawsuit—because the rent was lower?

A. Right.

Q. And you were being treated better?

A. On that particular day in time for a brief moment and off and on, I did have hope because I was an optimistic person.

* * * * *

**UNITED STATES DISTRICT COURT**
**DISTRICT OF MASSACHUSETTS**

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No. 1:01-CV-11300-RWZ

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FRANCIS MARCOUX, et al.,
*Plaintiffs*,

vs.

SHELL OIL PRODUCTS, et al.,
*Defendants*.

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Tuesday, November 16, 2004 (Day II)

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* * * * *

[140] JOHN SULLIVAN

* * * * *

[141] Q. When did you—at some point in time, did you get involved in the gasoline business?

A. Um, February 1970, I entered a station on Front Street in Scituate as an Atlantic Richfield dealer. I operated it from February 1970 to approximately February 1985 when Shell Oil Company took it over, they purchased Atlantic Richfield.

* * * * *

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MASSACHUSETTS**

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Civil Action No. 01-11300-RWZ

---

FRANCIS MARCOUX, et al.,
*Plaintiffs,*

vs.

SHELL OIL PRODUCTS CO. LLC, et al.,
*Defendants.*

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TRANSCRIPT OF JURY TRIAL
DAY THREE
November 17, 2004

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* * * * *

[4] (John Sullivan, previously sworn, resumed stand.)

* * * * *

[11] Q. On occasion did you receive writings from Shell which indicated in the words that Shell was reserving the right to terminate the VRP on certain notice periods?

A. That would be on the threshold payment they mailed to you [12] and delivered to you once a year. That would be on the document with your threshold gallons, I believe.

Q. What do you recall the documents saying with respect to Shell's ability to end the rent subsidy program?

A. That Shell could do away with it with a 30-day written notice.

Q. Did you ever discuss that 30-day notice with any of the Shell representatives as far as what that meant?

A. Yes.

Q. And [with] what Shell representatives did you have [a] discussion on that subject?

A. Bill McCollum, Heidi Massey, Greg Woolf.

Q. And these were representatives of Shell that serviced your area over a period of years; is that right?

A. Yes.

Q. And what did they say to you concerning the 30-day notice period?

A. The main bulk of the conversation was don't worry about it, they'll always have something like it because the rent subsidy is a viable part of their way of doing business with the selling of gasoline. And if they did away with that, they'd have to put something in its place because Shell knew very well that half the dealers would be out of business within a year.

Q. They told you that?

A. Yes.

[13] Q. Okay. And during what period of time were you told that?

A. Probably from the 90's, to the mid to late 90's.

Q. Did you ever inquire as to what this 30-day notice period referred to?

A. I pretty well understood it but they elaborated on it.

Q. What did they say to you about—

A. They'd only do that if there was a war or an embargo or a gas shortage, something drastic along that lines. A war.

Q. So that's what they explained that that—

A. That's why they put that 30-day notice in there.

Q. Who at Shell told you that that 30-day notice would only apply if there was a war or oil embargo?

A. The representatives I just spoke of.

* * * * *

[19] Q. Was there a new lease presented to you in calendar 2000, Mr. Sullivan?

A. Yes.

Q. And when you got that new lease, did you look at it?

A. Yes, I did.

Q. And when you looked at it, what did you observe?

A. That there was a tremendous amount of change in the way Shell was going to start doing business and Motiva was going to [20] start doing business with us, where we never had a triple net lease before. We had to pay for maintenance, real estate taxes and the fair market—so-called fair market value of the property.

Q. Keep your voice up. Were there other changes that you saw in the new lease document?

A. There was no rebate program offer whatsoever.

* * * * *

[21] Q. Mr. Sullivan, on the screen is—

* * * * *

Q. It's a letter to you from Motiva dated April 27, 2000, in which it indicates that Motiva Enterprises LLC has received an executed retail facility lease and retail sales agreement that appear to alter or to require alteration in the future of the terms of the RFL and RSA, or to re-

serve your right to challenge the enforceability of the RFL and RSA. Company does not accept these terms.

Did you at the point when you got the lease in 2000 raise some objections to Motiva about certain terms of the lease?

A. Yes.

* * * * *

Q. You had been a dealer at this time since 1985 for Shell; is that right?

A. Yes. I was a Shell dealer from 1985, and from 1970 at the same site I was an Atlantic Richfield dealer.

Q. And they wrote in the letter: Your failure to return an unaltered copy of this RFL and RSA within ten days of your receipt of this letter will be the basis for issuance of a notice of nonrenewal under the PMPA. Please note that this [22] letter is not a notice of nonrenewal under the PMPA.

* * * * *

Q. Was there any negotiation with respect to the 2000—the lease and the appeal supply agreement that was provided to you in calendar 2000?

A. Just one.

Q. What was that one?

A. You had the right for reappraisal of the property.

Q. And, in fact, you exercised that right; is that right?

A. Yes, I did.

* * * * *

[34] Q. Now, at some point—after the new lease was signed and the rent—and the reappraisal and the rent

was approximately— * * * did you try to continue to operate the business?

A. Yes.

Q. And what was the result[ ] of your attempts to continue to operate your business?

A. It was harder to make the adjustments. And one of the main contributing factors was, in my opinion, in my situation was the mental anguish.

* * * * *

[35] Q. The new rent, the new increased rent, did that cause any difficulty for you?

A. Yes.

Q. And how?

A. It caused twice—on two things. It was more money than I was paying and you could only make so many—you know, 10, 11, 12 cents a gallon. And the credit card business was picking up, and your income was going down because the credit card fees were going up percentage-wise. So instead of making 10 cents a gallon, you might have been making 5 cents a gallon on a credit card basis and half your business was credit cards.

[36] And then you had to get used to paying the real estate taxes and the maintenance. In 1999 when Motiva or Shell, whoever it was was paying us, they were paying us I believe it was $450 a month for the maintenance of the building. So we fixed things up ourselves, paint them and take care of the little things. And in the year 2000 when it was turned around, it was no longer 450. I believe it was 950 or 980 a month. It went from them giving us 450 to us giving them 980. And it was all these little things that it became a nonfriendly business atmosphere whatsoever.

* * * * *

[41] Q. At some point in time did you determine that you couldn't continue on, sir?

A. Yes.

Q. And did you contact Shell?

A. Yes.

Q. And who did you contact at Shell?

A. Greg Woolf.

Q. And what did you say to Mr. Woolf?

THE COURT: When was this, Mr. Sullivan?

THE WITNESS: I believe it was in April of 2000.

A. I told him I was going to leave the station, see if he wanted—see if he knew anybody that wanted to buy it.

Q. Did you ask him whether Shell was interested in buying it?

A. I didn't care as long as somebody bought it. I wanted to get somebody—out of there because I knew mentally I couldn't go on any further with this oil company and I was at my wit's end.

* * * * *

[42] Q. And at some point in time did you communicate with Shell that you had a potential buyer for your station?

A. Yes.

Q. And had Shell expressed any interest in buying your station—putting aside what they offered in 1986—in 1999, 2000 up to this time, had Shell expressed any interest to you in paying money for your station?

A. No.

* * * * *

Q. Is this a letter that you sent to Motiva in August of 2000?

A. Yes.

Q. Okay.

* * * * *

Q. And this says: I'm informing you that as of September 30 my lease is being sold to Chris Azizian of Hanover, Mass. for $25,000 and gas inventory. Relative to the property, if Motiva wishes to express their right of first refusal, I will turn the [43] location over to Motiva or Chris Azizian.

I thought you said before that prior Mr. Azizian had contacted you as of—in April?

A. I can't remember the exact time. Shell Oil Company sent them down or Motiva sent them down.

Q. Why'd you send this letter to Motiva?

A. To inform them officially that I had a buyer for the business. I was going to sell it to him.

Q. And Motiva sent you a—one of the reasons was you wanted to give them right of first refusal?

A. Correct.

* * * * *

Q. Motiva on September 13th wrote you back indicating that they had received your notice and please be advised that Motiva hereby elects to exercise its right of first refusal to purchase the interest in the franchise. This letter confirms Motiva's agreement to be bound by all the terms and conditions of the agreement of sale between you and Chris Azizian. In view of Motiva's exercise of its right of first refusal, we do not intend to review Chris

Azizian as a potential retailer of this retail outlet. Please execute and date two copies of this letter. And it goes on.

You signed this letter as well as Motiva; is that right?

[44] A. Yes.

* * * * *

Q. * * * And at some point in time, did you go to Motiva to—or have a meeting with anyone from Motiva to pick up your check for $25,000?

A. Yes.

Q. And when was that?

A. The day I seen the check was October 9th.

* * * * *

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MASSACHUSETTS**

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Civil Action No. 01-11300-RWZ

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FRANCIS MARCOUX, et al.,
*Plaintiffs*,

vs.

SHELL OIL PRODUCTS CO. LLC, et al.,
*Defendants*.

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TRANSCRIPT OF JURY TRIAL
DAY THREE
November 17, 2004

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* * * * *

[103] AKMAL MOA[W]ED, SWORN

* * * * *

[105] Q. You currently operate a Shell-branded gasoline station; is that correct?

A. Yes, I do.

Q. Where is that located?

A. It's located at the corner of West Broadway and D Street in South Boston, which is 302 West Broadway, South Boston, Mass.

Q. And how long you have been at that station, sir?

A. Twenty-three years.

Q. Have you always operated the station as a Shell-branded gasoline station?

A. When I started the business, I was an Arco dealer. And in 1985 Shell bought the interest of Arco, so I became a Shell dealer and then a Motiva dealer.

Q. Have you been a Shell or Motiva dealer since 1985 continuously?

A. Yes, sir.

* * * * *

[116] Q. The lease that you signed in 1998 with Mr. Parkman lasted for five years. * * * After the lease that expired, the lease that you signed in 1999, after it expired, did you come to sign a new lease with Motiva?

[117] A. Yes, I signed the lease with Greg Woolf for the year starting 2004. Three-year lease.

* * * * *

[129] Q. Mr. Moawed, in this lawsuit are you claiming that the increased rents that you've been paying since the elimination of the STIP have caused your business, your Shell business, any harm?

A. Yes.

Q. And could you tell us what that harm is, please.

A. The harm reflects on my street price, my street price is higher because of the rent being higher, and my cost on the [130] tank wagon is higher. So my street price is higher. I have less traffic of people coming to my location and I'm losing revenues.

* * * * *

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MASSACHUSETTS**

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Civil Action No. 01-11300-RWZ

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FRANCIS MARCOUX, et al.,
*Plaintiffs,*

vs.

SHELL OIL PRODUCTS CO. LLC, et al.,
*Defendants.*

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TRANSCRIPT OF JURY TRIAL
DAY FOUR
November 18, 2004

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* * * * *

[4] (Akmal Moawed, previously sworn, resumed stand.)

* * * * *

[5] CONTINUED CROSS EXAMINATION

* * * * *

[20] Q. Let me show you your financial—a summary of your financial statements for certain years. Now, Mr. Moawed, I can [21] let you know that this is a summary of information that we have taken from your financial statements for the years 1994 to 2003.

And you indicated in response to an earlier question with respect to the VRP threshold and how your business was doing that your income was going up. But, in fact, what this chart shows is that from 1994 to 1998, your net income bottom line was actually going down, was it not?

A. Right.

Q. And then from 1998 to 2003, your net income went up really quite a lot, correct?

A. Correct.

Q. And at the same time you were drawing—you're a corporation and you were drawing an officer's salary, which if you add to the net income, for example, in 2001 indicates that net income plus officer's salary for that year was about $121,000, correct?

A. Correct.

Q. As opposed to net income plus officer's salary in 1997, the year before the termination of the VRP, of about $34,000, correct?

A. Correct.

Q. What we've also done, Mr. Moawed, is taken your gross profit as reported on your financial statements, and for the benefit of the jury if it's difficult to read, the gross profit [22] line beginning in 1997 is 205,000; '98, 205,000; '99, 232,000; 2000, 327; 2001, 353,000; 2002, 362; and 2003, 327. If we deduct your rent from that number as you reported on that chart that you introduced in evidence yesterday, we get the numbers that are shown on the line gross profit minus rent. And rather than read those numbers, what we've done is we've created a chart that shows that in 1997, your gross profit minus rent was in fact $167,000, which is a little bit more than 150. And then in 2001, it actually goes up to $247,000.

And so am I correct that after your sales and after your cost of sales when you have your gross profit, that's the amount of money you have left over to spend on your business, correct?

A. Correct.

Q. And then after you paid your rent from 1997 to 2002, the amount you had left over actually went up, correct?

THE COURT: 2001—through 2001?

Q. Through 2001, it went up above where it was in 1997?

A. I explained that yesterday in my cross-examination that I had a unique situation with the diversion of the traffic to South Boston when they first opened the Ted Williams Tunnel. However, these numbers can be manipulated any way you like. If you make a chart and see what's the relation between my profit from the gas or between my rent to my gallons sold, you can see that my rent now is about 20 cents on every gallon of gas I'm [23] selling. So charts are statistical things that an educated guy can manipulate in any way to serve his purpose.

Q. Okay. But your net income is your net income, correct?

A. My net income is my net income. My net income increased because of the diversion of the traffic to South Boston from the Big Dig project, and that was a temporary thing I testified to yesterday and this is the fact.

Q. And that allowed you to make a lot of money during that period?

A. That's okay.

* * * * *

[26] Q. With respect to the revaluation in 19—in 2003, you testified yesterday that you did not seek a reappraisal?

A. I seek the reappraisal but I withdrew my request.

Q. I'm sorry, I didn't understand the answer.

A. I seek the reappraisal. I filled the form[ out] and I send it to Shell, and when the process was explained to me, I seek not to use it. I didn't think it's fair.

Q. Okay. In fact—in fact, you didn't pursue the reappraisal because in conversation with Shell—a Shell representative, you determined that the appraisal price was fair, correct?

[27] A. The appraisal price is not the issue. The issue is the way the appraisal is conducted, the way I am picking an appraisal over the phone, just somebody's name that I don't know anything about. And I don't have any right other than just paying his fees. And this person will be working for Shell, instructed by Shell, contracted by Shell as a matter of fact.

Q. But you thought the number that you learned from Shell to be the value that they appraised the station for, you thought that was a fair number, did you not?

A. As far as a piece of real estate?

Q. Yes.

A. I think that that's about right.

Q. So you were told, which you didn't indicate in your testimony yesterday, you were told by the Shell representative—in fact, you asked the Shell representative if the station were a certain—valued at a certain amount of money, would that cause my rent to go up or down?

A. Correct.

Q. And the certain amount of money was the value that you thought the station was worth, correct?

A. Correct.

Q. And what was that number?

A. About a million one to a million two.

Q. And you thought that was the value of the real estate and equipment and building at your station?

[28] A. Correct.

Q. And you have knowledge of the real estate industry in Boston, do you not, Mr. Moawed?

A. I have some knowledge.

Q. In fact, you're in the real estate business, are you not?

A. Yes, I am.

Q. Okay. So you had the ability when you understood—when your property was being reappraised in 2002, you had the ability to have a sense of what the value was worth, correct?

A. Correct.

Q. And you thought it was about a million to a million two?

A. Yes, sir.

* * * * *

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MASSACHUSETTS**

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Civil Action No. 01-11300-RWZ

---

FRANCIS MARCOUX, et al.,
*Plaintiffs,*

vs.

SHELL OIL PRODUCTS CO. LLC, et al.,
*Defendants.*

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TRANSCRIPT OF JURY TRIAL
DAY FIVE
November 19, 2004

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* * * * *

[81] FRANCIS MARCOUX, SWORN

* * * * *

[82] Q. Mr. Marcoux, you currently operate a Shell branded gasoline station; is that correct?

A. Yes.

Q. How many, sir?

[83] A. Two.

* * * * *

Q. Where are those two locations, please?

A. Webster, Mass. and Southbridge, Massachusetts.

Q. With regard to the Webster location, how long have you been there?

A. I grew up there. My dad had it. I took it over, and I took it over for him in 1975.

* * * * *

Q. And there's a second location in Southbridge, [84] Massachusetts, correct?

A. That's correct.

Q. And you acquired that in 1978?

A. Yes, that's correct.

* * * * *

[95] Q. We talked earlier in your testimony regarding the leases that you signed for the gasoline station. At some point in time after the formation of Motiva, were you presented with a Motiva lease for each of your gasoline stations?

A. Yes.

Q. And did those leases contain any sort of rent subsidy programs?

A. No.

Q. How did the rents that were going to be charged under your Motiva lease compare to the rents that you were being charged when Shell had its variable rent program in effect?

A. It was significantly higher.

* * * * *

[98] Q. And what year do you recall, sir, at your Southbridge location, what was the first year of your Motiva lease?

* * * * *

A. October 2001.

Q. So, in fact, your rents with the Motiva lease as compared to the rents you were earning with the STIP went down a little bit?

A. Yes. Looks that way.

Q. And this year you anticipate based on your current lease that you're going to spend $62,000 approximately for rent in Southbridge?

A. That is correct.

Q. Let me show you, please, a similar chart for your Webster location and ask you, to your knowledge, whether that accurately reflects the amount of rents that you paid for the years shown?

A. It looks that way.

Q. And at your Webster location, what was the first year that you received a Motiva lease?

A. Same time frame. They were—almost the same time frame.

Q. That would be 2001?

[99] A. October 2001.

Q. And, again, at this Webster location your rents went down?

A. That's correct.

Q. But compared to the rent that you were paying when the VRP was in effect, your rents were higher; is that correct?

A. It looks like two to three times.

Q. We heard some testimony this morning regarding a rent challenge that was available under the Motiva leases. Were you familiar with that?

A. Yes, I was.

Q. And do you have an understanding as to how that process worked?

A. I do.

Q. Could you explain it to the jury, please?

A. Sure. They had—you got proposed a package with the lease, and the rent figures were established on some sort of appraised value that they had, their appraisal. You had the option if you filled out a letter and gave it within a 30-day window, gave them notice that you would wish to—to have it reappraised, you could. If you exercised that right, they in turn came out and offered you a choice of three of their chosen appraisers. And you at that point in time you pick one, a short time later supposedly that you would get an appraiser to come out and he would appraise or she would appraise your property.

[100] Q. And at the time you were presented with your Motiva leases in 2001, did you exercise your option to do a reappraisal?

A. I did.

Q. What were the results of the—insofar as your rent was concerned when you exercised your right of reappraisal?

A. One station went up a little bit, and one station went down a little bit.

Q. Did you eventually, sir, did you sign the Motiva leases for both locations?

A. Yes.

Q. And did you make any notation on your lease?

A. I signed under protest.

* * * * *

[115] Q. You indicated, Mr. Marcoux, that you've sustained damages in this case, yet your companies are still in operation; is that correct?

A. That's correct.

Q. Can you explain to the jury how it is that you're continuing an operation?

A. Yes. I have a really good repair business. I've worked all my life in that area, and it's a strength of mine and I utilize another building that I have with it and it all falls under the umbrella of MAC['s] Shell. We use the facility in the building behind. We developed a towing business to a larger degree than we used to have and I have—I've generated a tremendous amount of income through repairs.

Q. What about with regard to sales of gasoline? Are you generating profits there, sir?

A. Pretty minimal nowadays.

* * * * *

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MASSACHUSETTS**

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C. A. No. 01-11300-RWZ

---

FRANCIS MARCOUX, et al.,
*Plaintiffs,*

vs.

SHELL OIL PRODUCTS CO. LLC, et al.,
*Defendants.*

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TRANSCRIPT OF JURY TRIAL
DAY 6
November 22, 2004

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* * * * *

[3] FRANCIS MARCOUX, Resumed
CROSS-EXAMINATION, Continued

* * * * *

[23] Q. The last chart I want to show you has to do with dealer income, both compensation to you and net income from the business.

* * * * *

[25] Q. Mr. Marcoux, let me represent to you that, again, from the financial statements that you provided from Ma[c's], the [26] company is called Ma[c's] Shell Service, Inc.; is that correct?

A. That's correct.

Q. And the financial data for Ma[c's] Shell Service, Inc., includes all of the revenues in the two service stations and their ancillary operations; is that correct?

A. That includes the house that I have and the income generated from the towing company also.

Q. So, the—

A. Which are not owned by Shell in any way, shape or form.

Q. So, the businesses, if you will, that are included within Ma[c's] Shell Service, Inc. include the operations at the Webster station?

A. That's correct.

Q. The operations at the Southbridge station?

A. That's correct.

Q. Your towing business?

A. That's correct.

Q. And I'm not sure I understand this fourth one.

A. I have a residential house that Ma[c's] Shell owns.

Q. A residential house?

A. Yeah, Ma[c's] Shell bought it. It's on the asset books. We own it.

Q. Do you rent it out?

[27] A. Yes, we do.

Q. To a family?

A. Yes.

Q. And how much rent do you get from that?

A. $7200 a year.

Q. $7200 a year. Any other income from that?

A. Not from the house, no.

Q. Or from that—do you have a way of referring to that house? Does it have a company or a designation or description?

A. We just throw it in. It's just part of Ma[c's] Shell.

Q. Okay. So, within that company you've included that house. Do you take depreciation on it?

A. I'm sure, whatever the accounting standard practices are. I think houses are 33 years, but it's only on the building. You can't depreciate the land. The land, I bought it because I was going to move part of my commercial business there. It's a commercial piece of property. It has a house on it.

Q. Other than the $7,000 a year in rent, there's no other income you receive from that residential property?

A. That's correct.

Q. What about the towing business, what does that consist of?

A. Three trucks.

[28] Q. Where are those trucks kept?

A. At the building behind the station.

Q. Is this on land owned by Shell or by you?

A. It's controlled by me.

Q. By control, is it leased from Shell?

A. No, I lease it from the same landlord that Shell leases the Shell station from.

Q. And you pay rent to that landlord?

A. I do.

Q. Do those trucks bring cars into the service repair bays?

A. On occasion, yes, they do.

Q. Are there repairs done as a result of your towing business?

A. That is correct.

Q. And they're done at your service bays?

A. Sometimes the service bays, we do some stuff outside on the tarmac. It depends when it is, what time of year it is.

Q. Who takes care of those trucks?

A. We do.

Q. Employees of Ma[c's] Shell Service Station?

A. Yes, that's correct, I'm sorry.

Q. Do those people, do they also work, this is all at the Webster location?

[29] A. That is correct.

Q. And do they do other work at the Webster location?

A. Yes, they do.

Q. Do they work in the repair bays?

A. Yes, they do.

Q. Do they receive a salary?

A. Yes, they do.

Q. And they generate income from their work at the repair bays?

A. Yes, they do.

Q. Do you have any separate employees that only work on the towing business?

A. No, I don't.

Q. What would you estimate the income from your towing business is?

A. 120,000 a year.

Q. And about how long have you had the towing business?

A. We've had it for quite a while, but we've changed it. We added a truck back in—we added one in '97, '98, so then we added another one in 2000.

Q. It started in '97 with a first truck?

A. No, I'm sorry, I'm thinking of the new vehicles we had.

Q. I see.

A. The 2000 truck was bought in the year 2000. We had an [30] International flatbed. We bought that.

Q. So, prior to 2000, you had two trucks and then in 2000, you acquired a third one?

A. That's correct.

Q. And the income starting in 2000, has that been about 100,000 to 120,000 from 2000 to the present; is that a fair estimate?

A. I think that would be fair, yeah.

Q. And you have some expenses in it in terms of leasing, having to pay rent to the landlord for that portion of the property, that tarmac area you described?

A. I don't think I follow you.

Q. Are there some expenses you have in connection with the towing business?

A. Maintenance of the trucks.

Q. Okay. And purchase of the trucks?

A. Yeah, they're in Ma[c's] Shell, they're an asset.

Q. So, Ma[c's] Shell bought the trucks?

A. That's correct.

Q. How much time do you spend on the residential business?

A. It's probably, you know, same kind of deal as once a tenant, I had one tenant in there for eight and a half years, no, eight years, eight years. Jason just left so we had to put a roof on it and some flooring and replace a [31] couple windows, but that's been it for eight years.

Q. How many hours a month or a year?

A. Collect a check, put it in the bank.

Q. Okay. With respect to the towing business, how much time do you spend on that?

A. It's part of my Ma[c's] Shell hours, I would think.

Q. So, that was included in the 30 to 60?

A. 30 to 60, yeah.

Q. It wasn't included in the 5 to 10?

A. No. I think you said you wanted up front hours versus back hours.

Q. All right. Let's look at your compensation then from these four businesses. In 1994, it was about $114,000, and this was taken, let me represent to you, from your financial statement, and in 1994, you didn't have your towing business, or did you?

A. I think I did. I had my truck, yes, sir.

Q. Okay. This was a separate line item on your financial statement called officer or maybe even Mr. Marcoux compensation. Do you recall that?

A. Yeah, I would think it's a salary column. If that's what you're referring to, I think that's what you've referred to.

Q. That's exactly what I'm referring to, yeah. So, for collecting your check from your tenant, operating the one

[32] truck and the two businesses, your compensation is about 114,000 in 1994; is that correct?

* * * * *

A. Yes.

Q. Is it fair to say that the overwhelming activity for which you were getting compensation during this time period was managing your two service stations?

A. That would be fair, yes.

Q. Moving down through the years, 1998, it went up to about 150,000; 1999, about 160,000; 2000, 150,000; and it dropped down for a couple years in 2001 and 2002 to about 100,000 and then 2003, it was 157,000, and based on the reports you've produced for this year, the analyzed number looks about 78,000. Do you see that?

A. Yes, I do.

Q. Then there's a net income column, and let me represent to you that that was the number at the bottom of the financial sheet for your business, for these four businesses for each of these years. Okay?

A. Yeah.

Q. And they move around, they go up and down, there are a couple years where they're actually negative and then for 2003, it's about 54,000 or 55,000, and for this year on an [33] analyzed basis, it looks like it's going to be about 115,000. Do you see those numbers?

A. Yes, I do.

Q. All right. What I want to do then is really get to the last column, which is the total. Are you the owner of Ma[c's] Shell Service, Inc.?

A. I'm the president, yes.

Q. Are you 100 percent owner?

A. Yes, I am.

Q. So, you would be entitled to the net income at the end of the year; is that correct?

A. That's correct.

Q. So, if we add your direct compensation, your salary and your net income, that's what's reflected in that last column?

A. That's correct.

Q. And let's see, 1997, the last year of the VRP, it was about 150,000, 160,000; 1998, it went up to 200 and then if we look going forward from 1999 and 2000, it's 200,000, I guess, with the exception of 2002 was about 152,000. Do you see those numbers?

A. I do.

Q. So, if we were to take the last five years, which is the very bottom row there for 2000 to 2004, your compensation either directly or through the net income of the business [34] has been over a million dollars; is that right?

A. That's correct.

* * * * *

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MASSACHUSETTS**

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C. A. No. 01-11300-RWZ

---

FRANCIS MARCOUX, et al.,
*Plaintiffs,*

vs.

SHELL OIL PRODUCTS CO. LLC, et al.,
*Defendants.*

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ORAL AND VIDEOTAPED DEPOSITION OF
EUGENE GOLL
January 7, 2004
[Played at Trial November 22, 2004]

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* * * * *

[4] EUGENE GOLL

* * * * *

Q. * * * [A]re you employed, sir?

A. Yes, I am.

Q. And by whom are you employed?

A. I'm employed by Shell Oil Products U.S.

Q. And for how long have you been employed by Shell Oil Products U.S.?

[5] A. I am entering my 30th year of continuous employment with Texaco, Star Enterprise, TRIME (phonetic), Equilon, and now Shell Oil Products U.S.

* * * * *

Q. And what is your position with Shell Oil Products?

A. I am currently the operations manager for the national wholesale group.

* * * * *

[88] Q. The goal, if I understand it, was—one of the goals of the plan was to reduce the number of franchisee [89] lease dealers?

A. The—I cannot agree with that comment. Okay?

Q. It wasn't—that wasn't a goal, to reduce the number of franchise dealers?

A. Franchise dealers represented the largest portion of the retail assets. The goal of the plan was—from a network and a market point of view, was to reduce our—our—our—our—our investment in—in the underperforming assets, whatever they were. Okay? I mean, we sold salary operations. We sold contractor operations.

Q. I understand part of the goal was to reduce—to divest the company of, as you [s]ay, underperforming assets. But another part of the goal was to acquire—have the company buy back from the dealers valuable franchises. Isn't that right?

A. In locations where it made sense that they could be operated more profitably as a salary operation or as a contractor operation, then yes.

* * * * *

[96] Q. * * * I just want to—because we're going to be in front of a jury—is that the goal here is that the quality sites that were previously being—or were then being operated by a lessee franchisee, the goal was to convert those quality sites into a company-operated, Motiva-operated station?

A. From a planning perspective, yes.

Q. From a planning perspective. And how you—whether you could get there or how you got there was another issue. Is that right?

A. Whether you could come to terms that are mutually agreeable is another issue.

* * * * *

[225] Q. Was it your expectation when the new rent program was enacted that the number of lessee dealers would increase—would decrease and the number of company-operated stores would increase, that that would be one of the impacts that resulted from the adoption of the new rent program?

* * * * *

A. The answer is yes, with a clarification.

[226] Q. Now, what is your clarification?

A. My clarification is, you know, the way that you're expressing it on a high level is that the number of—of company operations would increase. Well, of course, they would increase because that has been established as that's your primary channel from a planning point of view, and from a planning perspective, that is where you're going to focus your investment and your growth. Will the change in the rent program, will it have some impact on the RORO locations? Quite possibly, it will. The increase in taxes on a lot of these sites will probably have an impact as well. I mean, yes, but one isn't linked to the other.

* * * * *

[243] Q. Could you explain the reasons why Motiva and Equilon adopted the new rent program?

A. There were really several reasons. One is I know that Shell had been dissatisfied with the performance of the—of the VRP program, the variable rent program. The throughputs at the—at the outlets had continued to drop. Program was not yielding the results and the throughput performance that was desired.

[244] And also as a result of the benchmark study in 1997, it was very clear that Shell's net rental recovery per outlet was the lowest in the industry. That—those items, coupled with the fact that the industry as a whole over time had moved to market-based rental programs, and coming into the Alliance with Texaco and Star Enterprise already in a—in their own market-based rental programs, a decision was made to—to drop—to drop VRP and to—to develop a new rent program.

* * * * *

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MASSACHUSETTS**

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C. A. No. 01-11300-RWZ

---

FRANCIS MARCOUX, et al.,
*Plaintiffs,*

vs.

SHELL OIL PRODUCTS CO. LLC, et al.,
*Defendants.*

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TRANSCRIPT OF JURY TRIAL
DAY 6
November 22, 2004

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* * * * *

[45] RICHARD MELANSON, having been duly sworn by the Clerk, testified as follows:

* * * * *

Q. It's true, is it not, that you formerly operated a [46] Shell-branded gasoline station?

A. That's correct.

Q. Where?

A. It was located at 904 Main Street, Southbridge, Massachusetts.

Q. What were the dates of operation of that station, please.

A. I first took it over in 1976 and I sold it in 2001.

* * * * *

[51] Q. At some point in time after the formation of Motiva, were you presented with a lease to sign, a Motiva lease?

A. Yes, I was.

Q. For the use of your station?

A. Yes, I was.

Q. For the use of your station?

A. That's right.

Q. Did that Motiva lease have a rent subsidy or rent rebate program as part of it?

A. No, it did not.

[52] Q. How did the level of rent that you were required to pay under the new Motiva lease compare to the rents that you were paying when Shell had its rent subsidies programs in effect?

A. It was substantially higher.

* * * * *

[62] Q. Now, I note, sir, in 2001, there is only data for nine months. Can you tell the jury what occurred in 2001?

A. I sold my gas station in October.

Q. And why is it that you had decided to sell your station?

A. I gave it my best shot, and it wasn't working out. And the books looked pretty good at the time, and I couldn't see any future the way the rents were so high, my prices were already—I already raised all my prices and everything and my cigarettes, my soda, everything, my labor, to make a profit, and I thought I was in a position at that time—I was tired of fighting with Shell all the time.

They had done away with all the programs they had, the communications were bad. They would bill me for stuff that I shouldn't have got billed for, and it took me forever to get it credited to my statement. It became a nuisance to deal with them.

Q. In relation to the filing of the lawsuit, Mr. Melanson, did your decision come before or afterwards?

A. Oh, it was after.

[63] Q. I'm sorry.

A. It was in 2001 that I decided.

Q. Did you alert Motiva at that time that you were going to sell your franchise?

A. Yes, I did. I asked them if they'd like to sell me the property, and they said, no. I asked them if they'd buy my business, and they said no.

* * * * *

[65] Q. How much, sir, were you able to get for the business when you sold it?

A. $125,000.

* * * * *

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MASSACHUSETTS**

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C. A. No. 01-11300-RWZ

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FRANCIS MARCOUX, et al.,
*Plaintiffs,*

vs.

SHELL OIL PRODUCTS CO. LLC, et al.,
*Defendants.*

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TRANSCRIPT OF JURY TRIAL
DAY 7
November 23, 2004

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* * * * *

[27] RICHARD MELANSON, RESUMED
CROSS-EXAMINATION, CONTINUED

* * * * *

[38] Q. Now, you testified there came a time when you sold your station to Mr. Abraham; is that correct?

A. Yes, I did sell it to him.

Q. And as part of that sale, you had to provide Shell or Motiva a right of first refusal to purchase your station instead of selling it to Mr. Abraham; is that correct?

A. Yes.

Q. And you wrote a letter to Motiva formally complying with that obligation saying this is to notify you I'm selling

it and you have a right to exercise your right of first refusal, do you recall that?

A. Yes.

Q. I believe you said on direct that you understood from discussions with Motiva, your sales rep, that they were not interested in purchasing your business or they were unlikely to exercise that right; is that correct?

A. Yes.

* * * * *

[42] Q. And as a result of that, the sale went through and you received the $125,000 from Mr. Abraham?

A. Shell received $6500 for the transfer fee.

Q. Did you ever attempt to undo the sale or undo the transaction to Mr. Abraham, ever try to return the money?

A. No.

Q. The sale was in around October of 2001; is that correct, the closing?

A. It was on the evening of September 30th, I believe.

Q. Now, you decided about a year before, sometime in 2000, that you wanted to sell your station?

A. No, I didn't. It was in more of 2001 that I really made a decision that I was going to sell it.

Q. Did you make some changes in your business in 2000?

A. Yes, I did.

* * * * *

[44] Q. And some of the changes you made were to increase prices of various products, and I believe you said that that decreased your volume but on an overall basis it increased your total revenue; is that correct?

A. Yes.

Q. So, in other words, your volume went down, but because the prices went up, in a sense by more than that, your total revenue increased?

A. The basic picture looked pretty good profit-wise.

* * * * *

[49] Q. The final thing I want to go over with you is the net income from R.A.M. Corporation for the years 1994 through 2001. Again, let me represent these were taken from your financial documents. For the years 1994 through 1997, the net income went down, particularly '97, significantly, didn't it?

A. Net income, yes.

* * * * *

[50] Q. So, for the year 2000 though, your net income, and that was the first year no rebates, no subsidies, the year 2000, it was up to 56, almost 57,000; is that correct?

A. Yes, that's the year I worked really hard to make some changes so I could pay the rent.

Q. They paid off even better in 2001, your net income was up to 18[8],000?

A. That is the net income, that is the $125,000 that I sold the business in.

* * * * *

[54] REDIRECT EXAMINATION

* * * * *

Q. Mr. Melanson, counsel was just asking you questions about your net income for the year 2001, and in particular, as to whether or not that number reflected the sale of

your business in that year. Do you recall those questions?

A. Yes, I do.

Q. And you testified that you couldn't—that you did not believe that that number—or you believe that that number did include the value of the business?

A. Yes, I did.

* * * * *

[55] Q. I ask you to look, under categories listed, sale of business, is there a number reflecting $165,000 or 167,000?

A. Yes, there it is.

Q. Having reviewed that document, does it help refresh your memory of whether or not it was included in your gross income?

A. Yes, it was included.

* * * * *

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MASSACHUSETTS**

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C. A. No. 01-11300-RWZ

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FRANCIS MARCOUX, et al.,
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TRANSCRIPT OF JURY TRIAL
DAY 7
November 23, 2004

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* * * * *

[60] SID PRASHAD, having been duly sworn by the Clerk, testified as follows:

* * * * *

Q. You are a current operator of a Shell-branded gasoline station located on 48 Madison Street in Worcester; is that correct?

[61] A. Yes, that's correct.

* * * * *

[67] Q. After the formation of Motiva, were you at any point in time presented a Motiva lease for the station that you operated?

A. Yes.

Q. Did you have an opportunity at that time to look at the amount of rent that Motiva was proposing to charge you under [68] their lease?

A. Yes.

Q. How did that rent, sir, compare to the rents that you were paying when the rent subsidy programs were in effect?

A. It would be at least more than two times.

* * * * *

[70] Q. Did you eventually sign the lease?

A. No, I didn't want to sign it at first.

Q. Did you have any discussions voicing your concern about signing the lease with any Motiva representatives?

A. Yes, in a short period I had about three reps, and the first two were very brief, and I discussed that, you know, I can't pay this rent at this location. They insisted, that's the rent, that's what it's going to be, that I have to sign it, that I refused to sign it for a couple months.

Q. But you eventually did sign?

A. Yeah, Mr.— I think it was Mr. Richard Kennedy signed it. He came to the office, and he seemed upset, so I went into the office, we sit down. He said, "You have to sign this lease. If you don't sign the lease in 10 days, you will be terminated."

Q. And you signed it?

A. Well, no. I told him, Yes, okay, well, I would sign it but I want to sign it under protest. He directly said, and this was his words, he said, I remember it up to this date, he said on that paper you put your signature and the date, but anything else you will be terminated.

Q. Did you comply with his direction?

A. I had no choice.

* * * * *

[77] Mr. Prashad, you talked about gallon sales, competitive prices and higher rents. What steps have you taken to try to make your business more profitable in light of these expenses?

A. I've taken several steps. I wanted to stay in business. I liked where I was, so I took several steps to try to be and stay in business. No. 1 was I've started working more hours. I'm at my station every day in Worcester and spend in three days 10 hours. I have my mother who understands what's going on. She brings the phone, and I call her, she might be there. She works between 40 and 60 hours a week. [78] She's 65 years old because I can't afford to hire more employees. I've also got a line of credit at my bank so when I can't pay the bills to Shell, I don't bounce the check. If I bounce the check, I'll have to have a check waiting for the gas when the company brings the gas.

Q. You mentioned you work 8 to 10 hours a day. Approximately how many hours a week are you working now?

A. I work Saturdays and Sundays, 60 to 70 hours a week.

Q. How much of a salary do you draw, sir, annually?

A. I believe I discussed my accountant, and I've I think it's about between 27,000 dollars a year.

Q. And you mentioned that your mother works. Was it 40 to 60 hours a week as well?

A. Yes.

Q. How much of a salary do you pay her, sir?

A. Well, she understands what is going on with me in the business, and she understands, you know, where my

business is because of the rent and so forth, and she offered to help me and she spends as much as time as she can to help me. When I can't be there, she is there.

Q. The question, Mr. Prashad, how much does she get paid for that time?

A. She knows my position, so she wants to help me as a son, she don't get any pay.

* * * * *

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MASSACHUSETTS**

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C. A. No. 01-11300-RWZ

---

FRANCIS MARCOUX, et al.,
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*Defendants*.

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TRANSCRIPT OF JURY TRIAL
DAY 7
November 23, 2004

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* * * * *

[108] JORDAN AVRAMIDIS, having been duly sworn by the Clerk, was examined and testified as follows:

* * * * *

[109] Q. And you, sir, formerly operated a Shell branded gasoline station or gasoline station[s]; is that correct?

[110] A. Yes, I did.

Q. And those stations were operated through a corporation; is that correct?

A. Yes.

Q. And what was the name of the corporation, please?

A. The previous ones?

Q. Yes.

A. It was J&J Avramidis, Inc. and the other one was J&D Avramidis, Inc.

* * * * *

Q. What were the effective dates that you operated that station, please?

A. I started April 1, 1992 until April 30, 2004.

* * * * *

[117] Q. After the formation of Motiva Enterprises and at the expiration of your Shell lease that you signed in 1997 were you [118] presented with a new Motiva lease?

A. Yes, I did.

Q. And did that lease offer any sort of—as Mr. Wolf was saying—any sort of rent subsidy or programs that might offset your rent?

A. No.

Q. How did the amount of rent that you were being charged under your new Motiva lease compare to the rents that you were paying when you had the rent subsidies available to you from Shell?

A. I would say at least double if not more.

* * * * *

Q. Mr. Avramidis, when this chart comes into focus, if you could look at it, please, and let me know if it represents the rents that were paid for the period 1994 to 2003 at the Walpole location.

A. Yes.

Q. And in 1994 that rent was approximately $18,500?

A. Yeah.

Q. And in 2003 the rent had escalated to approximately $63,000.

A. Yes.

Q. Were you made aware, Mr. Avramidis, at the time you were [119] presented with your Motiva lease that you had an ability or right to challenge through a reappraisal the amount of rent you were paying?

A. Yes, I was, yeah.

Q. And did you exercise your right to get that reappraisal?

A. No, I didn't.

Q. Can you tell us why you made that decision?

A. Well, that is that I only had the choice to take the appraisal that Shell—I had to choose from three that Shell had in the lease, and would it be closer to my target, and I didn't think—I could trust making—I don't think it would be any different than the regional because it would come from the same service.

Q. Did you eventually sign the Motiva lease?

A. Yes, I did, yeah.

Q. And did you in any way indicate that you were protesting the lease as you signed it?

A. Yes, I did.

Q. How did you go about doing that, sir?

A. I'm in the lawsuit here, so I'm protesting with the lawsuit.

Q. You regarded the filing of the lawsuit as a protest?

A. Yeah.

Q. And had you filed the lawsuit prior to signing the lease?

A. Yes.

* * * * *

[126] Q. In light of the increased rents and the gas prices did you make any efforts to try to improve the operation of your business?

A. I tried, yeah, I did.

Q. Can you tell us, please, what steps you took to improve the business?

A. Well, the first thing that I did, I raised my price, and obviously that didn't help much because my volume dropped even more; and I increased my personal hours in the station, I was putting like 80 to 90 hours a week, and—

Q. Did you ever voice any concerns to any Motiva or Shell representative about your financial situation?

A. Yes, I did.

Q. Can you tell us who you spoke to and when?

A. I remember speaking to Craig Wolf, the sales rep, and we told him things don't look too good, you know, we cannot afford to—doesn't look like we can afford to pay the rent anymore and everything. And his reaction was—he had his feet up on the counter, he said if you don't think you can stay, why don't [127] you give us the keys?

Q. That was his solution to your predicament?

A. Yeah.

Q. Did you have any other conversations with any other Shell or Motiva people?

A. Just the last month before I was forced to close the station. I had a visit from the district manager[,] from Steve Bradley and I told him—I brought my concern that the way it looks like we're going to be out of there very shortly, I couldn't stay anymore. And his first reaction

was when do you think that's going to be? How long is that going to be before you go out?

Q. Did he have any suggestions to you in terms of ways that you might help to improve the operation of the business?

A. Not at all, no.

Q. And what, in fact—your business is no longer operating; is that correct?

A. Yes.

Q. Did you sell the business to a third person or did you sell it back to Shell?

A. No, I just gave them the keys.

Q. You turned the business back into them?

A. Yeah.

Q. Mr. Avramidis, the operation of the business in Walpole, it's true, is it not, that in the years when the variable rent [128] program was in effect that the business still operated with a bit of a loss; is that correct?

A. Yes, it did.

Q. Okay. How did that loss compare to the loss that the business sustained in later years after the VRP was eliminated?

A. As the years go by, it increased it more.

* * * * *

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MASSACHUSETTS**

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C. A. No. 01-11300-RWZ

---

FRANCIS MARCOUX, et al.,
*Plaintiffs,*

vs.

SHELL OIL PRODUCTS CO. LLC, et al.,
*Defendants.*

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TRANSCRIPT OF JURY TRIAL
DAY 8
November 24, 2004

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* * * * *

[116] JEFFREY BERNARD, having been duly sworn by LAW CLERK, was examined and testified as follows:

* * * * *

[117] Q. If you could just describe for us your employment background after you graduated from Penn State in 1969.

A. I went to work for Mobil Oil Corporation in 1969.

Q. How long were you at Mobil?

A. I was there for 30 years.

* * * * *

[119] Q. Is it fair to say that you were responsible at least in part in developing Mobil's rents for its lessee dealers?

A. Yes. During the period when I was planning manager I was responsible for—in an advisory capacity and a direct capacity to develop the rent programs, and in the capacity after 1997 to implement those rent programs.

[120] Q. And you left Mobil in 2000?

A. I left Mobil in April of 2000.

Q. Now, during the period 1985 through 2000 you were obviously familiar with the way that Mobil set rents.

A. That's correct.

Q. And if you could just tell the jury how Mobil set rents and [how] it changed during the period late '80s and throughout the decade of the 1990s.

A. As I described before, through 1992 we used the two-part rent system, a gallon collection on gasoline and fuels for part of the rent on a cents-per gallon basis, and then flat rent for other ancillary alternate profit centers.

In 1992 we started transitioning to an asset-based rent, where we calculated rent based on the value of the assets at the service station; and we used a formula that was eight percent. The way we determined eight percent was we looked at what was happening in the marketplace, what other competitors were doing, and also what would keep our dealers competitive in that marketplace.

* * * * *

[124] Q. Can you please share with us what your opinion is?

A. In my opinion the eight percent of asset value was the industry standard. This business is extremely competitive, and you cannot allow—as a company we had a responsibility to our dealers to make sure that they stayed competitive. Eight percent—the eight percent rent was a competitive program compared to what others in the

industry were paying, compared to what our—Mobil's desire to make from each of the locations because we made money not only from rent but we also made money from the sale of gasoline. We took that into consideration. We felt eight percent was the correct number.

* * * * *

[132] CROSS EXAMINATION

* * * * *

[133] Q. Okay. I'll get to the percentage in a minute, but I wanted to ask you some questions about the use of an asset-based rent formula.

As I understand your testimony, it's that an asset-based rent formula is the industry formula; is that correct?

A. Many companies have gone to that formula, yes.

Q. In fact, by the late 1990s hadn't most of the major branded gas companies transitioned to an asset-based rent formula?

[134] A. I believe that's correct.

Q. Okay. And they did so because they wanted to get a reasonable rate of return on their investment in real estate, just like a landlord would?

A. I think that they were reflecting the economics of each of the individual service stations, yes.

Q. So is the answer to my question, yes?

A. They were—they were understanding their role as a landlord as well as a supplier, yes.

* * * * *

[136] Q. Okay. In fact, Motiva didn't transition to an asset-based rent until about 2000 or so; isn't that right?

A. Well, I think they started to—the thought process in 1998 and 1999, and when they were able to implement it started in 2000.

Q. Okay. So it was actually one of the later companies to transition to the asset-based rent?

A. Yes, it was.

Q. In fact, Mobil had done so, I think you testified, in 1992 or 1993?

A. That's correct.

Q. So Motiva was late to the dance.

A. Late bloomers.

* * * * *

[142] Q. * * * Now, the only company that you mentioned that actually uses that formula is Mobil; is that right? Did I hear your testimony correctly?

A. Other companies, according to what I've been told by other companies, and the way that Mobil determined the rent also used—I believe, used eight percent in their net rent calculation.

Q. Okay. And what other companies used eight percent apart from Mobil?

A. Over a period since 1992 we looked at various number of companies. I was told specifically that in the time frame 1998, 1999, 2000 that Sunoco and Cumberland Gulf used eight percent.

Q. And who told that you Cumberland Gulf used eight percent in the 1998 to 2000 time?

A. A representative from Cumberland Gulf.

Q. Okay. And what's this person's name?

A. I met her at a meeting in Arizona. I cannot tell you what her name is. I know she was—the meeting I was at was high-level executives from all the represented companies, so I know she was in a position to be able—to give me information.

[143] Q. Well, do you know what her job position is?

A. I think she was the marketing operations manager.

Q. Do you know whether she was responsible for rent?

A. She understood what the rent program was for Cumberland Gulf.

Q. Okay. So it's your testimony that another company that used an eight percent asset-based rent formula in the 1998 to 2000 period is Cumberland Farms Gulf?

A. What they told me—I described what Mobil's program was and she told me their program was consistent with Mobil's program.

Q. But she didn't tell you that they used an eight percent asset-based formula

A. I assume from the conversation what she meant was and what she said was Mobil is the big daddy in New England where Cumberland Gulf is—primarily markets, and we couldn't be out of line with what Mobil was doing.

Q. Okay. But she didn't at the time [tell] you eight percent, you assumed that?

A. I assumed that from the conversation because she said it was consistent with Mobil's program. Same thing with Sun.

Q. Tell me about Sunoco. Who told you their program was eight percent asset-based rent in 1998 to 2000 period?

A. Their eastern regional dealer.

Q. And tell me what he told you.

[144] A. He described—he used to be a Mobil employee so I knew him very well. I described what Mobil's current program was, he side said Sunoco's program is consistent with Mobil.

Companies aren't very—they're reluctant to talk about specific programs. They would confirm that their program was consistent with Mobil.

Q. Did this unnamed person from Sun company also tell you that Sun used an eight percent asset-based rent formula?

A. He said the Sunoco program was consistent with the Mobil program. I confirmed with this other Sunoco dealers who happened to be my client. Based on your locations, they paid eight percent in rent.

Q. But the company representative that you talked to never told you they used an eight percent rent formula in so many words?

A. No, he would not—he said, look, that's proprietary information. I will tell you that our program is consistent with Mobil's.

* * * * *

[146] Q. Okay. So your opinion about the eight percent asset-based rent formula only relates to the period 1998 to 2000?

A. Well, in addition to that I've confirmed with sources at Mobil, who are in the real estate department and also are—used to work for me in the customer support area where we had to—we were responsible for implementing rent, if the rent program had changed; and I was told that they had not implemented a new rent program, that it was still at eight percent.

Q. And who did you talk to at Mobil that told you that?

A. Dave Fisher in the real estate department and Debra Scoal, who worked for me in Malvern in the customer support area. She's responsible for and in charge of all the relationships with dealers and distributors.

Q. And did those two people tell you specifically that Mobil still used an eight percent asset-based rent formula?

A. That's what they told me.

Q. So your testimony today to the jury is up through the present Mobil continues to use an eight percent asset-based rent formula?

A. Up until the end of 2003 the people that should know were not aware of any change to Mobil's eight percent program.

* * * * *

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MASSACHUSETTS**

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Civil Action No. 01-11300-RWZ

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FRANCIS MARCOUX, et al.,
*Plaintiffs*,

vs.

SHELL OIL PRODUCTS CO. LLC, et al.,
*Defendants*.

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TRANSCRIPT OF JURY TRIAL
DAY NINE
November 29, 2004

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* * * * *

[28] STEPHEN PISARCZYK, SWORN

* * * * *

[29] Q. Mr. Pisarczyk, it's true, is it not, that you've operated Shell-branded gasoline stations since the 1970's?

A. That's correct.

Q. And most recently you operated two different stations, one located at 114 West Boylston Street, West Boylston, Massachusetts and the other at 257 West Boylston Street, West Boylston, Massachusetts?

A. That's right.

* * * * *

[30] Q. Do you recall having any specific conversations with any Shell representatives concerning the variable rent program?

A. Yes, I recall.

Q. Can you please tell us with whom you spoke, approximately what that date was, and what the substance of the conversation was?

A. During around 1989, I believe it was, I was interested in purchasing another franchise; and I had gone to the bank and applied for a loan around $200,000. And the loan officer at the bank asked me if I would bring my lease package in for them [31] to review. When they reviewed the package, they saw that I had a clause in my variable rent program where I—Shell could terminate the variable rent in 30 days. They asked me to clarify this. And I went back and spoke to Mr. Winters, who was my Shell representative, and he—when I brought the subject up to him, he asked me how long have I been in business? And I said since 1982. And he said you've had the variable rent program ever since then, haven't you? And I said yes, I have. And he told me at that time that the variable rent program would continue into the future, or a similar program, and that I shouldn't worry about it and go back to the bank and explain the situation to them. And I did.

Q. Did you get your loan?

A. Yes, I did.

Q. Did you have any other conversations with any Shell representatives in particular with regard to the location that you operated at 114 West Boylston Street?

A. Yes, I did. I also spoke to Mike Winters about my 114 location, that I intended to modernize my C-store there and renovate the station into a garden center. And I was

concerned at that point as to whether the VRP would continue or whether I would have to pay my contract rent. And he told me to just go ahead and make my investments, that I wouldn't have to worry about paying the contract rent.

Q. Do you have an approximate date for this conversation, sir?

[32] A. It was probably in the early 90's, I believe.

Q. Based upon the discussions that you had with Mr. Winters and your experience with the program since 1982, what was your understanding with regard to the variable rent program?

A. The variable rent program was the method that Shell used to compute my rent.

Q. And what, if anything, Mr. Pisarczyk, did you do in reliance upon the statements that had been made to you about the variable rent program?

A. I made some investments into my station that I ordinarily wouldn't have done if I had to pay the contract rent.

Q. And in 1998, the variable rent program was replaced with a STIP program; is that correct?

A. That is correct.

Q. And were you able to continue to earn rent credits with the STIP program, in effect?

A. Yes, I was, but they weren't as great.

* * * * *

Q. When this variable rent program comes into focus, I'd like you to look at the numbers and tell us if they accurately reflect the amount of rent that you were paying at your 114 station?

A. Yes, they do.

Q. And in 1994, your rent was approximately $24,000; is that correct?

[33] A. That's correct.

Q. Now, I see in the year 2000 that we've got calculated seven months rent. Why is that?

A. I stopped selling gas in the end of July.

Q. So you weren't charged rent anymore?

A. That's correct.

Q. Had you paid the full year's rent in 2000, do you know what that amount would have been?

A. It would have been about $57,000.

Q. At some point towards the end of 1999, did you have an occasion to sell your other location at 257 West Boylston Street?

A. Yes, I did.

Q. And could you just tell us briefly what the circumstances were surrounding the sale of that property or that business?

A. During May of '99, I had a firm offer to purchase the 257 location for $300,000, and I forwarded a right of first refusal to Shell.

* * * * *

[36] Q. Focusing—and I know this is probably true for all of your Shell stations, but focusing on 114 West Boylston Street, it's true, is it not, that you're required to purchase your gasoline from Shell Oil Company?

[37] A. That's true.

Q. And you pay a price which is referred as to a DTW?

A. Yes.

Q. Have you ever had any discussions with any of your Shell representatives concerning the dealer tank wagon price that you pay?

A. Yes, I spoke to Mike Winters.

Q. And can you tell us, please, what the substance of the conversation you had with Mr. Winters was—

THE COURT: When did it take place?

THE WITNESS: This took place in probably the mid 90's—'96, '97 and after.

Q. And what was the substance of the conversation?

A. Excuse me. I'm sorry, that isn't right. It took place probably in, I believe, in the late 80's it started.

Q. Okay. And what was the conversation?

A. I spoke to him and I told him that the—the price I was paying for my gas was making it so that I was uncompetitive on the street. I was paying just too much money for the gas. And my competitors were all pricing way below me. And I just couldn't get down to their prices because what they were posting is what I was selling my gas for.

Q. And did he have a response to your concern?

A. He said that there really wasn't anything he could do as a Shell rep.

[38] Q. You're required, are you not, to offer sales of gasoline through credit cards at your station?

A. Yes.

Q. And it's true, is it not, sir, that you're required to pay a fee for the credit card services?

A. Yes.

Q. And what percentage is that, please?

A. It's around 3 percent.

Q. And who does that money get paid to?

A. Shell.

Q. You mention that your competitive prices on the street were higher than the other stations in the immediate area of the 114 West Boylston location?

A. That's correct.

* * * * *

[40] CROSS-EXAMINATION

* * * * *

[54] Q. So in the year 2000 when you showed a loss of $22,000, you actually had already decided to purchase the 114 West Boylston Street station, correct?

A. That's correct.

Q. And, in fact, you had been operating that station, in part, as a garden center for several years, had you not?

A. It was part of the operation, yes.

* * * * *

[57] Q. When did you decide that you wanted to purchase 114 West Boylston Street?

A. I wanted to purchase it from day one when I first received the lease there.

Q. And did you operate just a garden center there from day one?

[58] A. No, I didn't.

Q. When did you want to operate just a garden center there?

A. I would say probably I decided around the time I wanted to sell the 257 location.

Q. Okay. And was your son in business with you?

A. Yes, he was.

Q. Was he actually operating the garden center?

A. No, he wasn't.

Q. Okay. Who purchased the—who actually purchased the 114 West Boylston Street property?

A. My son did.

Q. Pardon me?

A. My son.

Q. So the purchase was actually made by your son, not by you?

A. That's correct.

Q. And what was the purpose for which the business was used thereafter, for which the property was used thereafter?

A. Our intention was to continue our garden center there, but due to the time it took for Shell to clean up the hazardous waste on the property, which was over a year, we were forced to buy another piece of property and set our garden center up there.

Q. What did you do with the property when you purchased it?

A. My son purchased it.

Q. I'm sorry, when your son purchased it. I stand corrected.

[59] A. I believe he eventually leased it and then I think he sold it.

* * * * *

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MASSACHUSETTS**

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|---|---|
| *IN RE* Shell Oil Products Co. Dealer Franchise Litigation | MDL Docket No. 1461<br>United States District Court for the District of Massachusetts Civil Action No. 01-CV-11300 RWZ<br>United States District Court for the District of New Hampshire Civil Action No. 01-CV-430<br>United States District Court for the District of Rhode Island Civil Action No. 01-CV-514T |

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW**

Defendants, Shell Oil Company ("Shell"), Shell Oil Products Company, LLC (f/k/a Shell Oil Products Company), and Motiva Enterprises LLC ("Motiva") (collectively "Defendants") respectfully submit this memorandum in support of their Motion for Judgment as a Matter of Law as to all counts in the Plaintiffs' Second Amended Complaint dated January 15, 2003 (the "Complaint").

* * * * *

**D. Counts I and II – PMPA**

Defendants are entitled to judgment as a matter of law on the PMPA claim on several grounds. The threshold reason is that there has been no evidence presented to support the Plaintiffs' claim that they have been constructively terminated. Indeed, with one exception, the parties have taken affirmative steps to continue the fran-

chise relationship, with all but Mr. Pisarczyk entering into at least one renewal agreement after the Defendants ended all rent subsidy programs.

Furthermore, as discussed in Defendants['] Motion for Summary Judgment on Counts I and II under the PMPA, none of these renewing plaintiffs took steps to challenge the terms of their renewal agreements as provided for in the PMPA and which have been found to be the exclusive remedy for addressing claims arising out of renewal contracts. *See Dersch Energies, Inc. v. Shell Oil Co.*, 314 F.3d 846 (7th Cir. 2002).

The PMPA was enacted to address one narrow aspect of petroleum franchises—their ending, either by termination of franchises or non-renewal of franchise relationships. *Dersch Energies, Inc. v. Shell Oil Co.*, 314 F.3d 846, 859 (7th Cir. 2002); *Chestnut Hill Gulf, Inc. v. Cumberland Farms, Inc.*, 940 F.2d 744 (1st Cir. 1991); *Meghani v. Shell Oil Co.*, 115 F. Supp. 2d 747, 757 (S.D. Tex. 2000); *Ackley v. Gulf Oil Corp.*, 726 F. Supp. 353, 359 (D. Conn. 1989), *aff'd per curiam*, 889 F.2d 1280 (2d Cir. 1989). In finding against the existence of a claim for constructive termination or nonrenewal under the PMPA, the Seventh Circuit in *Dersch* emphasized that the regulation of petroleum franchise relationships is not governed by the PMPA but rather is a matter "of local concern in which the parties frame their relationships with reference to state law." 314 F.3d at 861. "Congress enacted the PMPA to federalize the standards by which petroleum franchises are terminated and petroleum franchise relationships are nonrenewed, not to create a federal common law for governing petroleum franchise agreements. In other words, the PMPA was not designed to provide franchisees with a federal forum for run of the mill contract disputes like those at issue in this case.

Without termination or nonrenewal, Dersch has no claim under the PMPA." *Id.*

Like the plaintiff[ ] in *Dersch*, the crux of the Plaintiffs' claims in the instant matter is that the Plaintiffs did not like certain changes implemented by Defendants, not that their franchises have been terminated in a manner governed by the PMPA. However, to the extent that they can demonstrate that there has been a termination or nonrenewal recognized under the PMPA, the statute, as interpreted by a substantial body of case law, provides a specific and exclusive remedy and Plaintiffs simply failed to adhere to that stated procedure. Specifically, the PMPA limits the grounds upon which a franchisor can terminate or decline to renew a franchise and requires the franchisor to give 90 days' written notice to the franchisee before doing so.

A franchisor that believes that it has grounds to terminate or non-renew a franchise must initiate the process by sending a notice of termination or non-renewal that strictly complies with the requirements of Section 2804(c). *See Abrams Shell v. Shell Oil Co.*, 216 F. Supp. 2d 634 (S.D. Tex. 2002), *aff'd*, 343 F.3d 482 (5th Cir. 2003). This commences a 90-day waiting period during which termination or non-renewal is prohibited. 15 U.S.C. § 2804(a)(2). During this waiting period, the franchisee remains in control of the station and suffers no PMPA damages flowing from termination or non-renewal. The purpose of the 90-day waiting period is to allow the franchisee an opportunity to seek to enjoin the termination or non-renewal under the less stringent standard for injunctive relief set forth in subsection 2805(b)(2). *See Jet, Inc. v. Shell Oil Co.*, 2002 U.S. Dist. LEXIS 22951, *15 (N.D. Ill. Nov. 22, 2002), *citing Beachler v. Amoco Oil Co.*, 112 F.3d 902, 905 (7th Cir. 1997).

This statutory scheme protects both the franchisor and the franchisee. *See Beachler*, 112 F.3d at 905. No termination or non-renewal can be effective unless the franchisor strictly complies with the notice requirements of Section 2804(c). *See Abrams*, 216 F. Supp. 634. The sending of the statutory notice of termination provides both the franchisor and franchisee with an unambiguous statement of the grounds for termination or non-renewal, and clearly commences the 90-day waiting period. 15 U.S.C. § 2804(c); *see Jet, Inc.*, 2002 U.S. Dist. LEXIS 22951 at *15. The injunctive relief procedure allows the franchisee to continue operating its business on the terms of the previous agreement while the merits of its action against the franchisor are resolved. *Id.*; *Dersch*, 314 F.3d at 863.

In light of the alternatives available to franchisees under the remedial scheme of the PMPA, federal courts across the country have uniformly rejected claims under the PMPA where the franchisees have elected to renew their franchise agreements without following the notify-and-wait procedure contemplated by the statute. *See, e.g., Jet, Inc.*, 2002 U.S. Dist. LEXIS 22951 at *18 (rejecting claim under PMPA where plaintiffs renewed their franchise agreements rather than refusing them, receiving a statutory notice of non-renewal and seeking injunctive relief within 90 days as prescribed by the statute); *Abrams Shell*, 216 F. Supp. 2d at 641 (finding no claim under PMPA where the franchisor had not given a definite notice of termination or non-renewal pursuant to § 2804 and the franchise relationship was ongoing); *Dersch*, 314 F.3d at 866 ("Had [plaintiff] allowed the defendants to issue a formal notice of non-renewal, its dispute with the defendants would have been transformed from a mere contract dispute into a non-renewal (within

90 days) of its franchise relationship—thus allowing it to meet its burden under § 2805(c) and maintain suit against the defendants via § 2805(a)-(b). However, by signing the renewal agreement, and thus renewing its statutory 'franchise,' [plaintiff] divested itself of the right to bring an action under the PMPA."). These cases demonstrate that a franchisee cannot sustain a claim under the PMPA when it signs a new agreement and accepts the benefits of renewal, leaving all of the statutory components of its PMPA franchise intact.[4]

In sum, the PMPA does not permit a franchisee to sign a renewal agreement, ignore the statutory procedures for challenging the agreement, and *then* bring suit for damages.

Four of the Plaintiffs (Karol, Marcoux, Moawed and Prashad) remain in operation and each entered into new franchise agreements with Motiva[5] without challenging their terms under the procedures of the PMPA. One Plaintiff (Melanson) likewise entered into a new lease and supply agreement with Motiva[6] without challenging their

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[4] Plaintiffs have cited to *Pro Sales, Inc. v. Texaco, U.S.A.*, 792 F.2d 1394 (9th Cir. 1986) for the proposition that a franchisee need not go out of business before seeking relief under the PMPA. However, not only has the *Pro Sales* case been discredited and criticized by numerous courts[,] [it] is entirely distinguishable from the instant case. In *Pro Sales*, the court held that a franchisee who signs a renewal lease "under protest" and *promptly* seeks to invoke its rights under the PMPA has not renewed the franchise relationship so as to bar relief under the PMPA. *Id.* at 1399. As this Court has noted in its October 22, 2003 decision on Plaintiffs' Request for Injunctive Relief, the Plaintiffs here did not renew their franchises under protest and certainly did not seek "prompt" relief under the PMPA.

[5] Karol: January, 2001 and January, 2004; Marcoux: November, 2001; Moawed: January, 2004; Prashad: July, 2000 and July, 2003.

[6] Melanson: June, 2001

terms under the procedures of the PMPA and thereafter sold his business to a third party for $125,000.

Still another dealer (Sullivan) entered into a new lease and supply agreement with Motiva[7] without challenging their terms under the procedures of the PMPA and thereafter entered into an express mutual termination of the franchise relationship, which is a proper ground for termination under the PMPA. 15 U.S.C. § 2802(b)(2)(D). This issue is separate and distinct from the issue of release, since it rests on a permissible ground for termination under the PMPA and is not subject to a claim of duress since dealers have procedural safeguards to challenge an impermissible termination under the PMPA, none of which were exercised.

Plaintiff Avramidis also entered into new franchise agreements with Motiva[8] without challenging any of their terms in accordance with the exclusive procedures available under the PMPA.

Plaintiff Pisarczyk continued to operate his business well after the rent subsidy programs ended without challenging the contract rents or any other terms of his existing lease, and he continued to pay full contract rent until he voluntarily ceased operating a service station on the location and purchased the property from Motiva in order to run the garden business he had developed at the location.

* * * * *

[Dated: November 29, 2004]

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[7] Sullivan: June, 2000

[8] Avramidis: January, 2002

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MASSACHUSETTS**

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*Defendants.*

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TRANSCRIPT OF JURY TRIAL
DAY ELEVEN
December 1, 2004

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* * * * *

[72] ROBERT MORRIS, SWORN

* * * * *

[73] Q. And you retired you say basically?

A. Yes.

Q. How long has that been?

A. I retired in April or June of 2002.

Q. And from what position did you retire?

A. At the time of my retirement I was the General Manager of Network Development for Shell Equiva, which is one of the Alliance companies. It was Shell it was a part of.

* * * * *

[84] Q. Mr. Morris, you were describing your experience at Texaco insofar as rent rebates and rent programs were concerned.

A. Yes. As I mentioned, I went into marketing in the field position in 1994, and prior to that time the rent rebates that had been common with Texaco had been eliminated. We were on a market-based rent system.

Q. When you came to Equiva in 1998, did you understand that Shell still had rent rebates at that point?

A. Yes, I did.

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* * * * *

[115] MICHAEL F. HANLEY, SWORN

* * * * *

[116] Q. When you testified by videotape, I believe you told us that you had been involved in the rent programs at Shell company?

A. That's correct.

Q. Can you tell us what do the leases that the lessee dealers [117] sign, what do they entitle them to do with the properties, the lease properties?

A. We lease them the land, the equipment, the improvements, the whole facility, and it entitles them to operate all of those facilities on that site.

Q. And what kinds of operations are the lessee dealers allowed to conduct?

A. Well, you know, it's kind of dependent upon what facility is there. If it's a repair station with lube bays, then they do a lot of automobile repairs; but as a C-store, then they can determine essentially what products they want to carry in the C-store and how they want to price them. And then if there's a car wash, they can determine how they want to market and manage that business.

Q. And for these businesses you've described, the convenience store, the car wash, the repair business, how much of the revenue from those businesses does Shell or Motiva participate in?

A. We don't participate in any of the revenues from the sales of any of those products other than the gasoline.

Q. You testified that you were involved in the decision to terminate the VRP?

A. I did. I was.

Q. Can you tell us why Shell decided to terminate the VRP?

A. Yes. There's a lot of reasons really. VRP came along in [118] 1982, a long time ago, and it was developed in a time when we were in a really gasoline-focused business. Gasoline is what we had. It hadn't come to C-stores yet or car washes or anything, and the variable rent program was totally focused on gasoline. So we had like a disconnect over time because the industry changed. I think you've heard some testimony about how—how people were—customers wanted C-stores, customers wanted other sources of shopping and stuff when they stopped and bought gasoline. And to have a rent program that only dealt with gasoline missed the mark of what a lot of the business was about.

Other issues included that when we started the variable rent program back in the 80's, the amount of rent

that Shell was collecting was real similar to what all the competitors were collecting. They didn't have a thing called a variable rent program. They had something and we all looked like we were collecting kind of similar rents, from the data I saw. But over time, the competitors moved on and they evolved to—into the 90's into having many of them, most of them I think, asset-based rents. And that facilitated their ability to move forward with all these new business models, like car washes and C-stores and stuff. And here we were still just with the rent program thinking gasoline. We were kind of late adapting.

Q. Why specifically was the decision made to go to an asset-based rent?

[119] THE COURT: You mean why that particular method of determining rent?

MS. FINN: Yes, exactly.

A. While I had been involved in studies that looked at a lot of different things and we hadn't quite made a decision, along came the joint venture with Texaco. And one of the things that was of great concern to us was a legal issue that said if you have two—I'm not a lawyer, but if you have two dealers who are like similarly situated or competing, if you will, or you supply them both, you have to treat them the same. You have to charge them the same prices for things and that would include rent. And so one of the things we had to decide early on when the joint venture came to be was, okay, what was that one rent going to look like? Because we had to have one.

And I was—I was the program manager for rent, among other things, and it was kind of a duh because the industry had gone to asset-based rents, Texaco was at an asset-based rent, and we had been subsidizing for a long time and not getting a return. We had to move forward,

we had to change. And it was obvious that an asset base was the right answer because that's where the industry was and that's where our partner, our new-found partner was. It was like really obvious.

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* * * * *

[3] MICHAEL HANLEY having been previously duly sworn, was examined and testified further as follows:

* * * * *

Q. I think where we left off yesterday was, you were talking about how accurate your estimate had been about the amount of the new program rents that would result from a transition to asset-based rent.

A. Yes.

Q. Have you had an opportunity to analyze the difference between the contract rents that the plaintiffs in this case paid and the program rents that they paid on average under the new 10-12-12 asset-based formula?

A. I have.

Q. Let me ask you to look at a chart, and this is [4] Defendant's Exhibit 1526. Can you tell us what this chart is, Mr. Hanley?

A. Certainly. This chart is a rent comparison. The blue bar is the amount of the contract rent that was in the leases of the plaintiffs who ultimately signed new leases prior to the implementation of the program rent, and the red bar is the amount of rent that was in the contract in the first year of those plaintiffs' program rent contract.

Q. Okay. And what are the numbers?

A. The rent in the—I'll call it the old contract was $7,020, and the program rent, the actual program rent of these plaintiffs who signed the leases are $6,812.

Q. So how does that program rent figure compare with the estimate that was in the chart that you prepared in early 1998?

A. The real numbers based on appraisals are much lower. The $11,000 was just an estimate.

Q. When you prepared the chart in early 1998, at what point in the process of coming up with a new rent program were you at?

A. I believe that I presented that to the management. I guess I should put it in context and say I was making a presentation. That chart was just one of several pages. I was meeting with the vice presidents of the former Texaco Company and the former Shell Company and helping them [5] understand where each of the companies were with regard to rent and a couple of other things. And the intent of that chart—well, and so it was very early. I think I'm getting off track here.

Q. Okay. And what were you trying to analyze when you put that chart together?

A. Well, I was trying to communicate and sort of educate the leadership as to what the realities were, and I needed them to understand that Shell had a rent program that was way different certainly than Texaco's, that Shell had very low actual net rents, very low, much below the industry.

Q. Do you remember what the figure was for the net rent based on the VRP program?

A. I do. It was $2,800.

Q. And was that a high rent or a low rent compared to a commercial—

THE COURT: He just told us.

Q. —business rent?

A. Well, compared to a commercial rent, it was much lower than a McDonald's would pay for a corner or charge their franchisees for a corner. It was not only the oil industry but the commercial real estate industry demanded rents—

MR. GREENBERG: Objection, your Honor.

THE COURT: I think he's answered the question. It was much lower than commercial rents.

* * * * *

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* * * * *

[25] MICHAEL JOSEPH ROMAN having been first duly sworn, was examined and testified as follows:

* * * * *

Q. By whom are you employed?

A. I'm employed by Exxon Mobil Corporation.

* * * * *

[26] Q. How long have you worked at Exxon Mobil?

A. I have been with Exxon Mobil for 28 years, Heritage Mobil.

Q. Okay. And when you say Heritage Mobil, what does that mean?

A. Prior to the merger of the two companies at the end of 1999, which was the effective date of the merger, I worked for Mobile Oil Corporation prior to that.

Q. And in the course of your employment with Mobil and then Exxon Mobil, did you have occasion to become familiar with its rent programs for its lessee dealers?

A. Yes, I did.

Q. And how were you able to do that?

A. I was the fuels franchise strategy manager from the time of the merger up until the beginning of this year, and prior to that time, I was also involved in retail programs management and dealer business management, which got me very familiar with the rent programs.

Q. And specifically why did you have to deal with the dealer rent programs in those job functions?

A. They were part of my responsibility.

* * * * *

[27] Q. Let's not talk about today. Let's go back to 2003. Can you tell us what the rent program at Exxon Mobil was at that time?

A. Yes, I can. Effective March 1 of 2003, Exxon Mobil introduced a 12 percent asset-value rent program.

* * * * *

Q. What would the 12 percent apply to?

* * * * *

A. The asset-value programs that we have or the asset-value program that we put into effect on March 1, 2003, was a program that was based on 12 percent of the value of land, building, and improvements at the site.

[28] Q. And before you went to the 12 percent asset-based rent formula, what was the formula that was used?

A. Prior to that, upon the—one year after the merger of the company, we introduced a harmonized rent program that was essentially a 10 percent asset-value program, which was 10 percent of the land, the building, and the improvements.

MR. GREENBERG: Could we please have dates so we know when we're starting from and maybe what it was before?

Q. Can you give us, if you remember, the date when the 10 percent formula was adopted?

A. Approximately January 1 of 2001.

Q. Okay. And why did Exxon Mobil go to the 12 percent asset-based formula?

* * * * *

A. Exxon Mobil went from a 10 percent to 12 percent asset-based rent program because our senior management, and I guess, quite frankly, our shareholders, demanded 12 percent return on the investments that we make in our service station facilities, and we needed 12 percent rate of return in order to be able to get the capital that we need to continue to invest in the sites and keep those sites resilient and viable for the dealers who operate them.

* * * * *

[32] Q. Before it adopted the 12 percent formula, did Exxon Mobil conduct any kind of study of what other companies were doing in terms of their rent programs?

A. Yes, we did.

Q. And do you remember when you did that?

A. We did that study in October—approximately October of 2002.

* * * * *

[33] Q. When the company conducted this comparative study, did it identify any companies that were already at a 12 percent asset-based formula?

* * * * *

[34] A. I believe the question that you asked was, in the course—in the course of our study, did we identify any other companies upon review that had a 12 percent asset-value rent, therefore a 12 percent of land, building, and improvements? And the answer to the question is "yes," that company was Sunoco.

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**UNITED STATES DISTRICT COURT**
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[91] TIMOTHY BROOKS having been first duly sworn, was examined and testified as follows:

* * * * *

[93] Q. Who are you employed by?

A. Cumberland Farms.

Q. And what is Cumberland Farms?

A. Cumberland Farms is a retail convenience store and gasoline supplier of Gulf brand motor fuel.

* * * * *

[95] Q. How long have you been with Cumberland Farms?

A. Since 1989.

Q. Mr. Brooks, are you familiar with the various rental programs, the rental formulas Gulf has used in setting the rents to its dealers?

A. Yes.

Q. Approximately how many lessee dealers do you have?

A. Currently it's approximately 190.

Q. Would you describe the rental formula that was in place during the time period 1998 through 2003?

A. Yes. Cumberland Farms' rental policy was that we would take an objective valuation on a property based upon the highest and best use, and we would apply a rate of return on that. Our rate of return was 11 percent.

Q. There has been testimony about three components of a rent formula, one being for land, one being for improvements, and one being for equipment. What would that 11 percent in your formula be applied to?

A. It would be applied to all three.

Q. So one way we could refer to it is an 11-11-11 program?

A. Yes. We go the other way actually. We group all three [96] components together and say one 11, but, yes, it's the same thing.

* * * * *

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* * * * *

[110] DENNIS NIELSEN having been first duly sworn, was examined and testified as follows:

* * * * *

[111] Q. By whom are you currently employed?

A. Currently I'm employed by Motiva Enterprises.

Q. How long have you been employed by Motiva?

A. Since, I believe, 1998 when the alliance was formed with Texaco.

Q. And what have your responsibilities been with Motiva since 1998?

A. Since 1998, I have been assigned to manage Shell's wholesale business in the states of Western Massachusetts, Connecticut, and recently New York.

Q. And wholesale is not retail, which is what the lessee dealer class of trade is involved in, correct?

A. Correct. My job is to seek out small independent oil companies and provide the Shell brand to them via contract to their own lessee dealers or—

Q. Prior to the formation of Motiva, by whom were you employed?

A. Shell Oil Company.

Q. And for how long were you employed by Shell?

A. Since I began in 1976.

* * * * *

[119] Q. Now, you presented a renewal lease to Cynthia [Karol] at some point you think in 1994 or 1995?

[120] A. I believe it was something in that time frame, yes. It was surely before I changed to the wholesale portion of the business, I think.

Q. Do you recall any statement to Ms. [Karol] at that time that the VRP was not going to go away—

* * * * *

Q. What did you say about the VRP at that time?

A. I have very little recollection of having said anything in terms of the VRP. I can only speak in general terms of here's how I would address that issue, because that was ten or so years ago, and I can't remember a specific conversation.

* * * * *

A. All right, I believe that Cindy's concern would have been or was about the tenure of the Variable Rent Program, as I understand it. And my answer would have been, taking into consideration how I would normally an-

swer a question like that, I suspect that I would have addressed that by saying that if we look at the Variable Rent Program's tenure, how long it has been around, which I think was since 1982, and [121] see that we still have the program, then it doesn't seem likely that it was going to go away anytime in the near future. However, that is not Shell's policy. Shell's policy is that you are in possession of a letter that says that this program can be terminated with a 30-day notice at any time.

* * * * *

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* * * * *

[132] JOHN UMBECK having been first duly sworn, was examined and testified as follows:

* * * * *

[133] Q. Can you tell us where you're currently employed?

A. I'm employed at Purdue University, the Krannert Graduate School of Management at Purdue.

Q. And what is your position there?

A. I'm a professor of economics and currently the chairman of the department.

* * * * *

[141] Q. And what were those issues that you considered?

A. The two that I was asked to look at specifically was the [142] claim that Shell's rent was not consistent with the industry standard and that the price Shell charged their dealers, the DTW or the wholesale price—I don't know how you've been using that term here—

Q. We've been saying DTW.

A. DTW? Okay, that Shell's DTW was not commercially reasonable. That was the gist of the two claims that I looked at.

Q. What did you conclude with regard to those two issues?

A. I concluded that—well, let me stop here. I need to qualify something. The first claim that I looked at was that Shell's rent that they charged the lessee dealers was not consistent with the industry standard, that it didn't meet the industry standard. So before I answer your question, I need to tell you what I mean when I say an industry standard.

From what I've observed in the documents that I've read, the plaintiffs' experts are claiming that the industry standard is—if you can imagine a big white sheet of paper, it's a point on a piece of paper. It's the Mobil, Mobil Oil, their rent. They charged an 8 percent of appraised value rent, and that one point on the piece of paper is the industry standard.

And as somebody who's studied this industry for so long, I would say that that's not a good way to represent an [143] industry standard. I would view an industry standard as a dash, a bar going across that white sheet of paper. It's much broader than a point, and there are people all along that bar, some at each end, some in the middle.

Now, having qualified that, it's my opinion that Shell's rent is within the industry standard. It's on that bar.

* * * * *

Q. Why did you conclude that Motiva's 10-12-12 rent formula was consistent with industry practice?

A. Well, when you take that bar on the piece of paper and you start putting all the different rent programs that different oil companies have on that bar, you find that Shell is on the bar, and it's not at the top end and it's not at the bottom end. It's somewhere in the middle. And that's true consistently through time. I mean, I always have to be a little more specific about a time period, and I know you have been through what I've heard this morning. But that's true in 1998. That's true in 2001. It's true in 2003. So Shell has consistently through time had a rent program that falls within this what I call the industry standard.

Q. What has been your experience with the use of an [144] asset-based rent program in the oil industry?

A. Well, I've had a lot of experience with it from its inception. When I started working in the oil industry doing research and consulting, nobody had an asset-based rent program. They had a variety of different kinds of programs, but none of them were an asset-based rent program. Most of them at that time had a program where the rent was determined by how many gallons of gasoline they sold, and so it might be a 2-cent or a 3-cent per gallon rent. If you sold 100,000 gallons, you might pay $3,000 a month and so on.

That was phased out, and again here you'll see, I think, why I have to call the industry standard a bar rather than a point because it didn't just happen instantaneously. The first company that I know of that went to

an asset-based rent program was Atlantic Richfield, ARCO. And they, by the way, I think were the number one seller in New England until 1985 when they decided they didn't want to be out here anymore. They moved exclusively to the West Coast. But they went to an asset-based rent program prior to 1985.

Then you had Texaco start changing. Mobil was probably next. Then Chevron in about 1997 went to an asset-based rent program, and Shell is probably the last of the major oil companies to go to an asset-based rent program. But that's been my experience.

Q. And what were the reasons why the industry transitioned [145] to an asset-based rent?

A. It's very simple. It used to be that selling gasoline was very profitable. You could make a lot of money at the retail level selling gasoline. But that's—I'll call that the profit margin. Again I apologize because I don't know the terminology you've been using in the courtroom, but the dealer pays a price when he buys it. That's the DTW. And then he sells it at a retail price. And that spread is the profit margin. And those margins used to be quite large. Back in the late '70s and early '80s, they could be 15 or 20 cents a gallon, which is a lot of money per gallon.

Consistently they have fallen. Gasoline margins, profit margins at both the retail level and the refining level fell steadily throughout the 1980s. And by the end of the 1980[s], the oil companies were realizing that they weren't getting much more rent because they had these volume-based rent programs, and they now weren't making very much money on their gasoline, and so they were getting squeezed. And one by one they started adjusting saying, "Look, if we're going to start buying land at these high land price[s] and building modern gas stations and

complying with all the environmental regulations that are very costly, we have to start making money on the land and the buildings because the gasoline profits just aren't there anymore." And so one by one they started transitioning to an asset-based rent so that they [146] could—basically they were a landlord, they became a landlord and charged the rent consistent with what other types of property was renting for.

* * * * *

[147] Q. You testified that you concluded that the 10-12-12 percentage formula that Motiva used was consistent with industry practice; is that right?

A. Yes. Given the way I defined industry practice or industry standard, their rent program falls in that range, yes.

Q. And how did you go about reaching that conclusion?

A. I looked at the other rent programs.

* * * * *

[149] Q. You testified that the way you reached your conclusion was by talking to other companies?

A. In general, yes. Some of these companies I worked for recently, and I have a working familiarity with their rent programs. For example, Chevron, I just worked with them on their rent contracts and had some consulting work on their contracts. The same with ARCO and Cumberland Farms. Where I didn't have a recent association with them, I would call people, some of whom I've known for many years, some I met only recently, but I would ask them what their rent program was.

Q. What time period did you consider in terms of deciding the commercial reasonableness of the 10-12-12 formula?

A. I tried to go back to just prior to the formation of the alliance, so '97, '98. Sometimes they would voluntarily give [150] me information going back farther, but the three specific time periods that I looked at are what's in my report, '98, '01, and '03.

Q. And what did you find with regard to 1998?

A. Well, the table summarizes exactly what my report says. ARCO appraises the land. They use an asset-based rent. They appraise the land at highest and best use. They add 10 percent. They take 10 percent of that as a rent for the land and improvements, okay. And there's an asterisk there. We can come back if you want. We can talk about the subtle differences, but that's in general what they do.

BP/Amoco does the same thing. They appraise the land, its highest and best use and take 10 percent of that, of both the land and the improvements. And in the table we've collapsed improvements and equipment, so instead of seeing it as 10-10-10 or something like that, you just see it as 10-10, but it's basically the same thing.

Chevron, their asset-based rent program appraises the land's highest and best use, and they charge 13 percent. They take a 13 percent factor, multiply the appraised value, divide it by 12 for land and improvements.

Exxon at that time—and that's just prior now to when Exxon Mobil became Exxon Mobil, so they would appraise the land and multiply it by 15 percent.

Gulf/Cumberland Farms, you heard today that back in [151] '98 they were using 11 percent.

Mobil you heard today, back then they were using 8 percent.

Texaco was 10 percent of land and 11.5 percent of improvements.

And we left [S]hell/Motiva blank here because they were in the process of trying to figure out at that time what to do. They did not have an asset-based rent program at that time.

Q. So what conclusion did you reach about whether the 10-12-12 formula would have been consistent with the industry as of the 1998 time period?

* * * * *

A. * * * If you imagine that white piece of paper that I mentioned before with that dash line on it showing sort of what the industry is doing, you'll see that there are some that are lower than 10-12-12, and there are some that are higher than 10-12-12. And going into the deliberations where Shell was formulating now, trying to figure out what is the industry doing in preparation of their [152] decisions on their own rent program, you can see the 10-12-12 would fall within that range.

* * * * *

**[Defendants' Exhibit 1246]** [Shell Logo]

Station Location: 48 MADISON ST
WORCHESTER, MA 01608
Dealer WIC #22096221985

## MOTOR FUEL STATION LEASE

THIS IS A LEASE effective August 1, 1994 between SHELL OIL COMPANY, 400 Blue Hill Drive, Westwood, MA 02090 ("Shell") and SID PRASHAD II, 48 MADISON ST, WORCHESTER, MA 01608 ("Lessee").

PART I of this Lease sets forth the particular provisions of this Lease and includes the executions of this Lease by Shell and Lessee and any Special Provisions that may be applicable, and PART II sets forth the general provisions of this Lease and includes Exhibit A relating to Lessee's maintenance obligations and any Supplements to this Lease which may be referred to in PART I or any such Special Provisions. The provisions of Exhibit A and any such Special Provisions and Supplements shall control to the extent of any conflict between such provisions and the body of this Lease. The numbers in the left column in PART I relate to applicable articles in PART II.

## PART I

Article No.

1(h) Leased Premises located at: 48 MADISON ST, WORCHESTER, MA 01608.

3. Term of Lease begins on the effective date specified above and ends on July 31, 1999.

4.1 Premises rent:

| Period | | | Monthly Rent |
|---|---|---|---|
| From Aug. 1, 1994 | through | December 31, 1994 | $04190 |
| From Jan. 1, 1995 | through | December 31, 1995 | $04420 |
| From Jan. 1, 1996 | through | December 31, 1996 | $04620 |
| From Jan. 1, 1997 | through | December 31, 1997 | $04851 |
| From Jan. 1, 1998 | through | December 31, 1998 | $05094 |
| From Jan. 1, 1999 | through | July 31, 1999 | $05349 |

8(d) Minimum fire legal liability insurance: $300,000.

SPECIAL PROVISIONS: NONE

NOTE TO LESSEE: BE SURE YOU READ AND UNDERSTAND ALL PROVISIONS OF THIS BINDING DOCUMENT BEFORE YOU SIGN, INCLUDING PAGES WHICH FOLLOW.

Executed on the date(s) shown below.

SHELL OIL COMPANY

/s/ S. Prashad
SID PRASHAD II

Date: 07/10/94

By: /s/ B. McClellan
B.F. MCCLELLAN
AREA/TERRITORY MANAGER

Date: 7/15/94

## PART II

DEFINITIONS

1. As used in this Lease, whether in the singular or plural:

(a) alteration shall mean any addition or change to, or modification, removal or replacement of, any building, improvement or equipment on the Premises;

(b) business entity shall mean any legal entity which is not an individual, including, without limitation, a partnership, corporation, trust, estate or association;

(c) expiration shall mean the coming to an end of the term provided in article 3, or any extension thereof provided in article 14 or otherwise agreed to in writing by Shell and Lessee;

(d) law shall mean any applicable statute, constitution, ordinance, regulation, rule, administrative order or other requirement of any federal, state or local government agency or authority, which, unless otherwise specified herein, is in effect either at the time of the execution of this Lease or any other time during the term;

(e) maintenance or maintain shall mean, unless the context otherwise indicates, preventive maintenance, repairs, replacement, repainting and cleaning;

(f) nonrenewal shall mean a failure by Shell to continue or extend this Lease at the conclusion of the term provided in article 3, or of any extension thereof provided in article 14 or otherwise agreed to in writing by Shell and Lessee;

(g) PMPA shall mean the Petroleum Marketing Practices Act (15 U.S.C. [§] 2801 *et seq.*);

(h) Premises shall mean collectively the land owned or leased by Shell at the location identified in PART I, to

the extent improved by Shell or with Shell's written consent for use as a motor fuel dispensing station and for associated purposes, and the buildings, improvements and equipment now or hereafter located on the land; and

(i) termination shall mean the ending of the term for any reason before expiration, as defined herein.

LEASE

2. Shell hereby Leases to Lessee, and Lessee hereby leases from Shell, the Premises. Subject to article 6.2, Lessee acknowledges that the Premises are in good and safe condition and repair. Upon any termination or expiration of this Lease, Lessee shall peaceably surrender possession of the Premises to Shell in as good order and condition as when delivered to Lessee, excepting ordinary wear and tear, acts of God and maintenance for which Shell is responsible.

TERM—TERMINATION

3. This Lease shall be binding from execution and shall be in effect for the term set forth in PART I, unless extended pursuant to article 14 or otherwise by written agreement, but may be terminated by Lessee at any time by giving Shell at least 90 days' notice, or may be terminated by Shell as provided in the succeeding articles hereof.

RENT

4.1 General. Lessee shall pay Shell as rent for each calendar month, without deduction, set off, notice or demand, the sum specified in the schedule as set forth in PART I, in advance not later than the first day of such month, except that rent due on a weekend or federal holiday will be payable on the business day next following the due date. Rent for any period less than a calendar month shall be prorated. In addition to the rent specified

above, Lessee shall pay or reimburse Shell for, in accordance with law, all taxes which may be imposed on the rental of any real or tangible personal property included under this Lease, including any such taxes imposed for any prior periods in which Lessee leased the Premises from Shell. For the purpose of determining any such taxes due, Shell shall have the option at any appropriate time of identifying the tangible personal property included under this Lease and allocating thereto a portion of the rental hereunder.

4.2 Payment. Rent shall be deemed paid when received by Shell at its address provided by Shell to Lessee from time to time. Shell may at its option from time to time prescribe that rent be paid when due by draft or electronic funds transfer initiated by Shell, and Lessee shall provide any written authorization required for such purpose.

USE

5.1 General. The Premises shall be used for operation of the motor fuel dispensing station and associated facilities existing on the effective date of this lease or thereafter completed or installed by Shell or with Shell's written consent. Authorized use shall include the retail sale of petroleum products and carry-out automotive accessories but exclude any automotive repairs or services except such incidental services as are normally provided to vehicles receiving motor fuel while at the motor fuel dispensing driveway area (such as checking oil and coolant levels and cleaning windshields). Authorized use shall also include the operation of any convenience store, foodmart, car wash or other non-gasoline facility on the Premises according to standards established by Shell for such facility. Except with the prior written consent of Shell, which may be withheld consistent with applicable law, Lessee

may not use underground tanks, associated product lines or motor fuel dispensing equipment provided by Shell in the sale or dispensing of non-Shell motor fuel. Lessee's installation and use of any additional tanks and associated equipment for the purpose of selling non-Shell motor fuel shall be subject to article 5.6 and all other applicable provisions of this Lease and any related agreements between Shell and Lessee. If, with Shell's prior written consent, the Premises are used for any purpose in addition to the use provided for in the Lease and any related agreements between Shell and Lessee, Shell may charge a reasonable additional rent as compensation for such use.

5.2 Lessee's Efforts—Hours. Lessee shall devote Lessee's best efforts to preserve the value of the Premises for the foregoing authorized use by serving effectively the public's and consumers' needs, and shall keep the station open for the sale of motor fuel and fully illuminated during such hours each day and days each week as shall be necessary to assure that end, having due regard to prior practice, competitors' current practice, vehicular traffic patterns, customer convenience, availability of motor fuels and other customary criteria followed by Shell. Lessee shall personally and actively manage the business conducted at the Premises to assure good faith compliance with this article 5.2 and other provisions of this Lease.

5.3 Use Prevented by Law. Either Shell or Lessee [may] terminate this Lease on giving the other notice (or advance notice if and as required by law) if at any time any law shall operate or be enforced so as to prevent the continued use or occupancy of the Premises (either directly or by requiring specified alterations at a cost which is disproportionate to the value of the Premises for such

continued use or occupancy) for the purpose for which such Premises were being used immediately prior to the effectiveness, application or enforcement of such law, as the case may be.

5.4 Business Charges—Lawful Operations. Lessee shall satisfy all regulatory requirements and timely pay all charges incident to the ownership, possession or use of the Premises, the business conducted thereon, or the protection of the environment pertaining thereto, including all federal, state and local taxes, levies, assessments and charges (except ad valorem taxes on Shell's property and taxes based upon the net income of Shell); all license, registration, permit, occupation and inspection taxes and fees; all water, sewer, waste disposal, gas, electricity, telephone and other utility charges; and all taxes on Lessee's property on the Premises. Without limitation of the foregoing, Lessee shall comply with all laws, licenses and permits relating to the Premises or any use thereof or to any act or activity on the Premises, including, without limitation, any special zoning or other governmental restrictions specified in PART I and any such laws, licenses or permits pertaining to environmental protection. All licenses, permits and accounts required for the foregoing shall be in Lessee's name unless Shell, in its discretion, directs otherwise. If Shell at any time satisfies any such regulatory requirements or bears any such charges, Lessee shall reimburse Shell upon demand for Shell's costs so incurred, without prejudice to any other rights or remedies available to Shell hereunder or by law. Lessee shall not (a) commit or permit any fraudulent or illegal act or activity or any consumption of intoxicating beverages or use of illegal drugs on the Premises, or (b) maintain or permit any animal or condition on the Premises

which may endanger the health, safety or well-being of persons on the Premises.

5.5 Shell Alterations. Subject to the remaining provisions of this article 5.5, Shell shall have the right from time to time, without liability to Lessee, to make alterations to the Premises. Shell's right to make such alterations shall include, but not be limited to, modernization, reconstruction or remodeling of or adding to any buildings, equipment or other facilities on the Premises, and may involve the complete demolishing and rebuilding of any and all such facilities. If any such alteration will cause a substantial disruption or change in Lessee's business, Shell will provide Lessee with 90 days' advance notice of the terms of its proposal to make the alteration, or such shorter notice as may be reasonable in any emergency situation, and during the period of such alteration work Shell shall reduce or suspend the rent payable hereunder as full compensation for the restrictions in use of the Premises resulting from such work. Shell shall exercise due diligence to complete all such alteration work in an expeditious manner, but Shell shall not be liable to Lessee for any loss of profit or other loss resulting from the conduct of the work or any completion delay except for an adjustment of rent as provided above. Upon completion of such alteration work, the rent hereunder will be appropriately adjusted if a change in the rental value of the Premises has resulted therefrom.

5.6 Lessee Alterations. Lessee shall not make any alterations to the Premises, including removal or disablement of leak detectors or other environmental control devices, without Shell's prior written consent, which consent shall not be unreasonably withheld. Any such alteration to which Shell may give its consent shall be made in accordance with plans and specifications and by a con-

tractor approved by Shell, which approval shall not be unreasonably withheld. Except as otherwise agreed in writing by Shell, at any termination or expiration of this Lease any alteration made by Lessee shall, at Shell's election, become a part of the Premises and the property of Shell or Shell may require Lessee within 30 days before or after termination or expiration to remove such alteration and restore the Premises to their condition existing prior to such alteration.

MAINTENANCE

6.1 General. Subject to the following provisions of this article 6, Lessee shall at all times maintain the Premises (including adjacent sidewalks and driveways, easements and all landscaped area) and Lessee's own property and equipment thereon in good condition and repair, and keep the same neat, clean, safe and orderly. To those ends and always promptly as needed, Lessee shall perform the maintenance of Shell's property (or any of Lessee's property) which is specified in Exhibit A hereto, including any such maintenance as may be required by law unless Shell is expressly required by the same or other law to bear the cost thereof. Shell shall perform all other maintenance to Shell's property which Shell deems necessary or desirable (having due regard to the remaining term of this Lease and Shell's future plans for the Premises), provided that Lessee promptly gives Shell a written statement of each such maintenance which Lessee deems necessary. As to any maintenance concerning which Lessee fails to give Shell the above-required written statement, or which is necessitated, either partly or solely, by any negligent or otherwise wrongful act or omission of Lessee or Lessee's employees, agents or contractors: Shell may perform the same and charge to Lessee Shell's actual cost thereof, or in lieu of performing the

same, may charge to Lessee what would have been the reasonable cost thereof. If the Premises are made substantially unfit for the intended use hereunder by any cause, either Shell or Lessee may terminate this Lease by giving the other notice (or advance notice if and as required by law) within 60 days after such unfitness commences. Shell may enter the Premises at any time for the purposes of inspecting the same (including the pump meters), gauging and testing tanks, performing maintenance and making alterations. The termination or expiration of this Lease shall not relieve Lessee of any obligation for maintenance theretofore accrued.

6.2 Initial Maintenance. Within 10 days after the effective date of this Lease, Lessee may provide Shell a written statement of any maintenance for which Shell or any previous lessee (other than Lessee herein or any third party through whom Lessee claims an interest hereunder) may be responsible, and the preceding provisions of this article 6 shall apply to such maintenance. Lessee shall be responsible for any maintenance required on such effective date regarding which Lessee fails to give Shell a written statement as above provided, and Shell shall be relieved of all responsibility therefor.

6.3 Dealer Inventory Control. To assure early detection of any leak in the underground motor fuel storage system at the Premises, Lessee shall maintain methodical daily inventory control, including daily reconciliation of physical inventory readings with sales records and delivery receipts, in accordance with Shell's procedures and applicable law. Lessee shall give Shell immediate telephone notification (promptly confirmed by written notice) of any suspected product loss, of any claim or threatened claim by a third party related to a product loss or alleged loss, or of any newly discovered material fact relating to any

matter previously reported pursuant hereto. Without limitation of the foregoing, Lessee shall provide such notification to Shell of any inventory discrepancies for a single product (losses or gains) in excess of: (a) 300 gallons for a single day, (b) 150 gallons per day for three consecutive days (all losses or all gains) or (c) one-half of one percent (1/2 of 1%) of sales for any 30-day period. Shell, at its option from time to time, may require Lessee to provide Shell periodic written certifications that Lessee has complied with the foregoing provisions of this article 6.3. Lessee shall retain for a period of at least one year and make available to Shell for inspection and audit, at all reasonable times, Lessee's records and procedures maintained pursuant to this article 6.3. If Lessee refuses or fails to perform in a proper and timely manner Lessee's obligations under this article 6.3, Shell may, at its option and without limitation of any other rights or remedies available to it under this Lease or otherwise, (a) retain the services of a qualified independent third party to inspect and audit Lessee's performance as frequently as necessary, at the sole cost of Lessee, until such deficiencies are cured or (b) terminate or not renew this Lease and any related agreements constituting a franchise between Shell and Lessee.

INDEMNITY—REPORTS

7. TO THE FULLEST EXTENT PERMITTED BY LAW (BUT NO FURTHER) AND WITHOUT IN ANY WAY LIMITING ANY OF LESSEE'S OBLIGATIONS UNDER ARTICLE 8 OF THIS LEASE, LESSEE SHALL DEFEND, INDEMNIFY AND HOLD HARMLESS SHELL, ITS PARENT, AFFILIATE AND SUBSIDIARY COMPANIES AND THEIR RESPECTIVE DIRECTORS, EMPLOYEES AND AGENTS AGAINST ALL CLAIMS, SUITS, LIABILITIES,

JUDGMENTS, LOSSES AND EXPENSES (INCLUDING, WITHOUT LIMITATION, ATTORNEYS' FEES AND COSTS OF LITIGATION, WHETHER INCURRED FOR SHELL'S PRIMARY DEFENSE OR FOR SHELL'S ENFORCEMENT OF ITS INDEMNIFICATION RIGHTS HEREUNDER) AND ANY FINES, PENALTIES AND ASSESSMENTS ARISING OUT OF ANY BODILY, PERSONAL INJURY, DISEASE OR DEATH OF ANY PERSONS OR DAMAGE TO OR LOSS OF ANY PROPERTY (EXCEPT SHELL PROPERTY TO THE EXTENT SHELL HAS RESPONSIBILITY THEREFOR UNDER ARTICLE 6) OR FOR LIENS ON THE PREMISES, CAUSED BY OR HAPPENING IN CONNECTION WITH THE PREMISES (INCLUDING ADJACENT SIDEWAYS OR DRIVEWAYS) OR THE CONDITIONS, MAINTENANCE, POSSESSION OR USE THEREOF OR THE OPERATIONS THEREON, EVEN THOUGH CAUSED BY THE CONCURRENT OR CONTRIBUTORY NEGLIGENCE OR FAULT OF A PARTY INDEMNIFIED, BUT EXCEPTING ANY SUCH INJURY, DISEASE, DEATH, DAMAGE OR LOSS CAUSED BY (A) THE SOLE NEGLIGENCE OR FAULT OF A PARTY OTHERWISE INDEMNIFIED OR (B) DEFECTS IN SHELL PRODUCTS NOT CAUSED OR CONTRIBUTED TO BY ANY NEGLIGENCE OR FAULT OF LESSEE OR LESSEE'S EMPLOYEES, AGENTS OR CONTRACTORS, WITHIN 24 HOURS AFTER ANY OCCURRENCE WHICH MAY RESULT IN SUCH INJURY, DISEASE, DEATH OR LOSS, OR SUCH FINE, PENALTY OR ASSESSMENT, OR THE IMPOSITION OF SUCH LIEN, LESSEE SHALL REPORT THE SAME TO SHELL BY TELEPHONE AND SHALL PROMPTLY THEREAFTER CONFIRM THE SAME BY NOTICE

INCLUDING ALL CIRCUMSTANCES THEREOF KNOWN TO LESSEE OR LESSEE'S EMPLOYEES. SHELL SHALL HAVE THE RIGHT, BUT NOT THE DUTY, TO PARTICIPATE IN THE DEFENSE AND SETTLEMENT OF ANY SUCH CLAIM OR LITIGATION WITH ATTORNEYS OF SHELL'S SELECTION WITHOUT RELIEVING LESSEE OF ANY OBLIGATIONS HEREUNDER. LESSEE SHALL COOPERATE WITH SHELL IN SHELL'S INVESTIGATION AND DEFENSE OF ANY CLAIM OR SUIT. LESSEE'S OBLIGATIONS HEREUNDER SHALL SURVIVE ANY TERMINATION OR EXPIRATION OF THIS LEASE.

INSURANCE

8. Without in any way limiting any of Lessee's obligations, indemnities and liabilities under article 7 of this Lease or otherwise, Lessee shall maintain, at all times, at Lessee's expense and in compliance with any applicable requirements of law, insurance satisfactory to Shell of the following minimum types and limits:

(a) Workers' Compensation Insurance with statutory limits, and Employers' Liability Insurance with limit of $100,000 each occurrence. Such insurance shall include a waiver of the insurer's rights of subrogation against Shell.

(b) Comprehensive General Liability Insurance (including, without limitation, coverage for premises/operations, operation of vehicles owned, non-owned or hired, products/completed operations, and contractual obligations assumed in article 7 hereof) with a combined limit for bodily/personal injury and property damage of $300,000 each occurrence. If Lessee sells or dispenses alcoholic beverages, such insurance shall include coverage for such activity with a minimum limit of $300,000

each occurrence. Such insurance shall name Shell and any lessor from whom Shell may lease the Premises as additional insureds.

(c) Environmental Impairment Liability Insurance covering off-site losses, which will be maintained during any period and with such minimum limit as shall reasonably be required by Shell, either initially from the effective date hereof or at any time thereafter, having due regard to the availability of such insurance during any such period. Except with respect to any initial requirement for such insurance which may be specified in PART I, Shell shall give Lessee at least 90 days' notice of any new or modified requirement for such insurance. Such insurance shall include Shell as a named insured.

(d) Fire Legal Liability Insurance on the leased building and any other property on the Premises leased or loaned by Shell to Lessee (whether under this Lease or otherwise), in the minimum amount set forth in PART I or in such modified amount as Shell may specify by notice to Lessee at any time based on alterations made after the effective date hereof.

Any insurance maintained by Lessee pursuant to this Lease shall be regarded as primary insurance underlying any other applicable insurance. Prior to the effective date of this Lease and thereafter prior to the expiration of any required insurance, Lessee shall provide Shell with evidence satisfactory to Shell showing that the insurances specified above are in effect and will not be cancelled or materially changed without at least 30 days' prior written notice to Shell. Lessee shall further provide Shell with at least 30 days' prior written notice if any such insurance shall expire for any reason without being replaced with equivalent coverage. Any insurance plan arranged by Shell and participated in by Lessee may

provide for the periodic collection by Shell for the Insurer of Lessee's premiums as payments due under this Lease.

ASSIGNMENT—SUBLEASING—ENCUMBRANCE

9.1 General. This Lease is personal to Lessee. Except as otherwise provided in this article 9 or by law, Lessee shall not assign or encumber any of Lessee's interest in this Lease or in the Premises, or sublease all or any part of the Premises; or permit any other arrangement having similar effect of such an assignment or sublease, or permit any other person to occupy or use all or any part of the Premises, either voluntarily, involuntarily or by operation of law, without Shell's prior written consent, which consent shall not be unreasonably withheld. Each request for Shell's consent to any assignment, encumbrance or sublease shall be submitted in the manner specified for notices in article 13.1, and Shell shall have 60 days (or any lesser period specified by law) following its receipt of all qualification information reasonably required by it in which to grant or withhold is consent in writing. No consent to any assignment, encumbrance or sublease shall constitute a waiver of the provisions of this article as to any such future transaction. Any assignment, encumbrance or sublease made without Shell's prior written consent or otherwise in violation of this Lease shall be null and void.

9.2 Particular Acts. Without limitation, each of the following acts shall be considered an assignment subject to article 9.1:

(a) The transfer of Lessee's interest in this Lease upon death, whether by will or operation of law.

(b) Lessee becomes bankrupt or insolvent, makes an assignment for the benefit of creditors or institutes a pro-

ceeding under the Bankruptcy Code; provided that, in any of the foregoing cases, Lessee or other affected party shall have 60 days in which to have an involuntary proceeding dismissed.

(c) A writ of attachment or execution is levied on this Lease and not removed by Lessee within 30 days.

(d) In any proceeding or action to which Lessee is a party, a receiver is appointed with authority to take possession of the Premises and such receiver is not removed within 60 days.

(e) If Lessee is a partnership, a withdrawal or any change of interest (voluntary, involuntary or by operation of law) of any partner, or the dissolution of the partnership.

(f) If Lessee is a corporation, any dissolution, merger, consolidation or other reorganization, or other arrangement having similar effect, or the sale or transfer by Lessee or any shareholder of 10% or more of the voting shares of the capital stock of Lessee or of any lesser interest which cumulatively vests 10% or more of such voting shares in the transferee.

(g) If Lessee is composed of more than one person, any change of interest (voluntary, involuntary or by operation of law) of any such person.

9.3 Shell's First Refusal Right. Lessee may not sell, transfer or assign any of Lessee's interest in this Lease without first offering in writing to sell, transfer or assign the same to Shell or its designee on terms and conditions which are the same as those of the proposed sale, transfer or assignment to the third party. If Shell declines or does not accept the offer within 30 days from its receipt thereof and of a complete and exact copy of such third party offer, Lessee may make the proposed sale, transfer

or assignment to such third party if Shell gives its consent thereto as provided in article 9.1 hereof, but not at a lower price or on more favorable terms than those so offered to Shell. If such sale, transfer or assignment to such third party is not consummated within four months from Shell's receipt of the foregoing offer to it, Lessee shall re-offer the interest to Shell in accordance with the foregoing provisions. If Lessee is a partnership or corporation, the provisions of this article 9.3 shall be deemed to apply to any assignment described in article 9.2(e) or 9.2(f), as the case may be.

9.4 Assignment by Shell. Shell shall have the right to sell, transfer or assign its interest in this Lease and the Premises. Following any assignment of this Lease by Shell, Shell's assignee shall be substituted for Shell with respect to the rights and obligations of Shell provided herein.

TERMINATION OR NONRENEWAL BY SHELL—OTHER REMEDIES

10.1 Termination. Subject to any limitations imposed by law, Shell may, at its option, terminate this Lease upon notice (or advance notice if and as required by law) to Lessee for any one or more of the following grounds:

(a) failure by Lessee to comply with any provision of this Lease, which provision is both reasonable and of material significance to the relationship hereunder;

(b) failure by Lessee to exert good faith efforts to carry out the provisions of this Lease;

(c) occurrence of an event which is relevant to the relationship hereunder and as a result of which termination of this Lease is reasonable, including events such as:

(1) fraud or criminal misconduct by Lessee relevant to the operation of the Premises;

(2) declaration of bankruptcy or judicial determination of insolvency of Lessee;

(3) continuing severe physical or mental disability of Lessee of at least three months' duration which renders Lessee unable to provide for the continued proper operation of the Premises;

(4) loss of Shell's right to grant possession of the Premises through expiration of an underlying lease;

(5) condemnation or other taking, in whole or in part, of the Premises pursuant to the power of eminent domain;

(6) destruction (other than by Shell) of all or a substantial part of the Premises;

(7) failure by Lessee to pay to Shell in a timely manner when due rent and other sums to which Shell is legally entitled;

(8) failure by Lessee to operate the Premises for the sale of motor fuel for seven consecutive days, or such lesser period which under the facts and circumstances constitutes an unreasonable period of time;

(9) willful adulteration, mislabeling or misbranding of motor fuels or other trademark violations by Lessee;

(10) knowing failure of Lessee to comply with federal, state or local laws or regulations relevant to the operation of the Premises;

(11) conviction of Lessee of any felony involving moral turpitude; and

(12) death of Lessee, or if Lessee is a partnership or corporation, death of any partner or shareholder, as the case may be, who owns at least a 50% interest in Lessee, or who owns a lesser interest of at least 25% and is active in the management of Lessee;

(d) a determination is made by Shell in good faith and in the normal course of business to withdraw from marketing of motor fuel through retail outlets in the relevant geographic market area in which the Premises are located; and

(e) any other ground for which termination is provided for in this Lease or in any related agreements constituting a franchise between Shell and lessee, or is otherwise allowed by the PMPA or other applicable law.

10.2 Termination Prior to Effective Date. If, after execution but prior to the effective date of this Lease, Shell has grounds to terminate or not renew any then existing Motor Fuel Station Lease between Shell and Lessee covering the Premises, or to terminate this Lease as if it were then in its term, Shell may terminate this Lease, as well as any such then existing lease, based on such grounds.

10.3 Nonrenewal. Subject to article 14 and any limitations imposed by law, Shell may, at its option, fail to renew this Lease or any franchise relationship existing with respect thereto upon notice (or advance notice if and as required by law) to Lessee for:

(a) any one or more of the grounds specified in article 10.1(a) through 10.1(d); and

(b) any other ground for which nonrenewal is provided for in this Lease or in any related agreements constituting a franchise between Shell and Lessee or is otherwise allowed by the PMPA or other applicable law.

10.4 Acts Attributable to Lessee. In determining whether a ground for termination or nonrenewal exists under this article 10: the acts or omissions of Lessee's employees, agents and contractors shall be deemed to be the acts or omissions of Lessee, and (a) if Lessee is composed

of more than one person, the acts or omissions of each such person shall be deemed to be the acts or omissions of Lessee, or (b) if Lessee is a partnership or corporation, the acts or omissions of the Key Management Person designated in PART I if any, and of each partner or shareholder, as the case may be, shall be deemed to be the acts or omissions of Lessee.

10.5 Other Remedies. Following any termination or the expiration of this Lease, (a) Shell may re-enter and repossess the Premises, without limitation of any other rights or remedies available to it under this Lease or otherwise, and (b) Lessee shall peaceably surrender the Premises to Shell as to any of Lessee's property which Lessee fails to remove from the Premises at the termination or expiration of this Lease. Shell shall have the right to sell all or any part of same for Lessee's account on such terms as Shell may desire, but with the rights in Shell to apply the proceeds of such sale, after reimbursing itself for the costs thereof, to the payment of any indebtedness of Lessee to Shell, and to purchase any or all such personal property. All sums due by lessee to Shell under the provisions of this Lease shall be payable by Lessee to Shell as provided herein, and shall bear interest at the rate of 10% per annum (or lesser maximum rate permitted by law) from the date due until paid. Either party's right to require strict performance of the other's obligations hereunder shall not be affected by any previous waiver, forbearance, course of dealing or trade custom or usage.

UNDERLYING ESTATES—CONDEMNATION

11. If Shell does not own the Premises, this Lease (a) is subject to all conditions or restrictions affecting the lease under which Shell is now entitled to possession, including, but not limited to, any special conditions or restric-

tions specified in PART I; and (b) shall terminate upon expiration or any sooner termination (by Shell or otherwise) of such lease if and as permitted by law, and Lessee shall not commit or permit any act or omission which would impair or jeopardize Shell's interest under its lease. If all or any part of the Premises is condemned for public or quasi-public use as provided in article 10.1(c)(5), or is (as it may be) voluntarily conveyed by Shell to any party having and intending to exercise the power so to condemn, either Shell or Lessee may terminate this Lease by giving the other notice (or advance notice if and as required by law); and whether or not this Lease is so terminated, Lessee assigns to Shell all of Lessee's right or interest in any award or settlement for such condemnation or conveyance in lieu thereof subject to any applicable requirements of the PMPA, provided that Lessee shall retain the right hereunder to pursue directly against the condemning party any claim Lessee may otherwise have under applicable law to receive compensation for business relocation expense or for loss of business opportunity or good will.

LESSEE'S BUSINESS

12. Nothing in this Lease shall be construed as reserving to Shell any right to exercise any control over, or to direct in any respect the conduct or management of, the business or operations of Lessee on the Premises; but the entire control and direction of such business and operations shall be and remain in Lessee, subject only to Lessee's performance of the obligations of this Lease. Neither Lessee nor any person performing any duties or engaged in any work on the Premises for or on behalf of Lessee shall be deemed an employee or agent of Shell, and none of them is authorized to impose on Shell any obligations or liability whatever. Except as provided by

law, nothing in this Lease, or now or ever hereafter on or part of the Premises, shall be construed as granting to Lessee any franchise, license or other right to use any of Shell's trademarks, brand names, service marks or color scheme and Shell reserves the right to remove or obliterate any thereof now or ever hereafter on or part of the Premises as to which Lessee does not have the right of use under any separate agreement.

NOTICES

13.1 General. Except as otherwise specified herein, every notice hereunder shall be in writing and subject to any requirements of law, may be given to Lessee by personal service or to either Lessee or Shell by certified letter, telegram, electronic mail, mailgram, or overnight or local courier and, in the latter instances, shall be deemed given when the letter is deposited in the U.S. mail or the telegram or other such communication is deposited with the dispatching agency, postage or charges prepaid, and directed to the party for whom intended at such party's address first herein specified, or at such other address as such party may have substituted therefor by notice so given to the other.

13.2 Personal Service—Business Entity or Joint Lessee. If Lessee is a business entity, Shell may give notice by personal service on (a) the Key Management Person designated in PART I pursuant to article 16.3, if any, (b) any officer or director of a corporation, (c) any partner of a partnership or (d) any personal representative, agent or employee of any other business entity. If Lessee is composed of more than one person such notice may be given to any such person who is an individual or to any such person who is a business entity in the manner provided next above.

CONTINUATION OF RELATIONSHIP

14. Neither Shell nor Lessee shall have any obligation to renew this Lease or continue their relationship established hereunder beyond the term provided in article 3, or any extension thereof agreed to in writing by Shell and Lessee, except if and as required by law. If by operation or effect of law Shell is required to continue its relationship established hereunder with Lessee beyond the term specified in article 3 and the parties fail to extend or renew this Lease by written instrument, then the term of this Lease shall be extended on a month-to-month basis on the same terms and conditions as were last provided in this Lease for not more than six successive months, subject (a) to termination by either party as herein provided or (b) to nonrenewal by Shell at the end of any such month.

RELATION TO EXISTING LAW

15. To the extent that any provision of this Lease is in conflict with any valid and enforceable law existing on the effective date hereof, such provision shall be deemed amended to conform with such law as it applies to this Lease at the time either party takes any action or exercises or claims any right under such provision.

BUSINESS ENTITY OR JOINT LESSEE

16.1 General. This article shall apply if Lessee is a business entity or composed of more than one person (i.e., any combination of individuals and business entities).

16.2 Joint and Several Obligations. If Lessee is composed of more than one person, the obligations imposed hereunder shall be joint and several as to each such person, and all such obligations shall be deemed to apply to each such person with the same effect as though such person were the sole Lessee.

16.3 Personal Obligations and Provisions. If Lessee is a business entity, all obligations and provisions hereof of a personal nature shall apply as if such business entity were an individual, and shall also apply insofar as is legally possible and reasonably practicable to those individual persons who have or exercise management responsibility for such business entity, including, without limitation, officers, directors or agents of corporations and partners of partnerships. Such business entity shall manage its affairs with respect to the personal obligations and provisions in a manner so as to give full force and effect to same. If Lessee as a business entity has initially designated in PART I or subsequently designates a "Key Management Person" who has or exercises primary management responsibility for Lessee's day-to-day operations, Shell shall be entitled to look to such designated Person in connection with the application of such obligations and provisions of a personal nature. Subject to Shell's prior written approval, which shall not be unreasonably withheld, Lessee may at any time, as appropriate, initially designate or make a substitute designation of a Key Management Person.

EXCUSES FOR NON-PERFORMANCE

17. Either Shell or Lessee shall be excused from its obligations under this Lease (except financial) to the extent that performance is delayed or prevented by any circumstances reasonably beyond such party's control or by fire, explosion, mechanical breakdown, strikes or other labor trouble, plant shutdown, riots or other civil disturbances, or voluntary or involuntary compliance with any law, regulation or request of any governmental authority. Any nonperformance excused under this article 17 shall not deprive either Shell or Lessee of any remedy otherwise existing under article 10 hereof or the PMPA.

ENTIRETY—EXECUTION—SUCCESSION

18. This Lease terminates, as of its effective date, any prior lease by Shell to Lessee of the Premises, and merges and supersedes all prior representations and agreements, and constitutes the entire contract between Shell and Lessee concerning the subject matter or in consideration hereof. Neither this Lease nor any subsequent agreement amending or supplementing this Lease shall be binding on Shell unless and until it is signed for Shell by a duly authorized representative. Subject to the foregoing provisions hereof, this Lease shall bind and benefit Lessee's heirs, estate and assigns, and Shell's successors and assigns.

**Exhibit A**

**to Motor Fuel Station Lease**

LESSEE'S MAINTENANCE OBLIGATIONS
(SEE ALSO ARTICLES 1(e) AND 6)

(Note: "Maintain" includes repairs and replacement unless otherwise stated)

A. Yard

1. Maintain all elements within planter areas as necessary to retain a healthy and attractive appearance. Items include, but are not limited to, all live and artificial plantings (shrubs, grass, flowers, trees, etc.), decorative rock, bark and the entire sprinkler system.
2. Regularly remove weeds, leaves, debris and litter from the Premises (including rain gutters and downspouts and adjacent sidewalks, driveways and easements).
3. Remove snow and ice from the Premises (including adjacent sidewalks, driveways and easements).

B. Lighting

Maintain all lamps and bulbs, ballasts, ballast wiring, starters and sockets in the interior of building. Excludes total fixture replacement.

C. Plumbing

1. Clear clogged toilets, sinks, building lube bay drains and on-property sewer lines. Clean oil separators and catch basins.
2. Maintain all flush mechanisms and faucets.
3. Drain water lines to prevent freezing.
4. Empty septic tanks as necessary.

D. Heating/Air Conditioning

Provide seasonal inspection and service for heating and A/C systems (to include: tighten belts, lubricate bearings, clean/adjust furnace burners, add air conditioner refrigerant) and replace air filters. Maintain any window air conditioner units in entirety.

E. Glasswork

Replace all window and door glass, whenever scratched, cracked or broken from whatever cause. Includes bullet-resistant glass or plastic.

F. Floors

Restore floors to original condition upon removal of equipment installed by or at request of Lessee, subject to normal wear and tear.

G. Painting

During the interval between periodic general repainting by Shell, wash and paint all curbs, yard and building equipment, interior/exterior walls, doors, ceilings and shelving as necessary. Paint to be furnished by Shell; all other painting materials by Lessee.

H. Tanks

1. Check daily for leakage and water using water-finding paste. Maintain daily inventory control as specified in article 6.3. (Failure by Lessee to monitor tanks daily for contaminates and product loss may expose Lessee to responsibility for lost product and payment of Shell's cleanup or repair costs, or both).
2. Empty waste oil tank, using legally acceptable method of disposal. Obtain and pay for necessary regulatory permits for proper disposal and maintain document records as required by law.

3. Keep fills and access boxes clear of ice, snow, water and debris.

I. Pumps/Dispensers

1. Lubricate any gasoline suction pumps in use (where motor and pump are contained in dispenser housing). Lubricate suction pump weekly or per manufacturers recommendations.
2. Maintain gasoline hoses, clamps, retractor cable, nozzles, swivels and colored scuff guards, including any associated with a vapor recovery system; check daily for visible leaks.
3. Maintain air and water hoses, nozzles, couplings and air chucks.

J. Air Compressor

Drain water daily. Add/change oil, replace air filters and lubricate bearings per manufacturer's specifications.

K. C-Store/Food Mart and Related Equipment (if located on Premises)

1. Maintain Shell-owned cooler/freezer doors and refrigeration units (walk-in and freestanding), gondolas and all other Shell-owned C-store/food mart related equipment, including lamps, ballasts, fuses and glass therein.
2. Keep all food handling equipment and food preparation areas clean, sanitary and in compliance with applicable codes and laws.
3. Keep all equipment drain lines clean and clear.

L. Car Wash Equipment (if located on Premises)

Maintain all elements of Shell-owned car wash equipment, including any optional or add-on equipment

systems with control and connection hardware, and all elements of any water reclaim system. This excludes complete equipment package replacements.

M. Other Equipment

1. Maintain all lessee-owned equipment.
2. Furnish and maintain portable fire extinguishers.

N. Miscellaneous

1. Maintain all building locks, keys, door closers and latches.
2. Maintain all elements of overhead doors, excluding total door replacement.
3. Reset circuit breakers, replace electrical fuses.
4. Keep restrooms at all times neat, clean, safe and orderly, free of offensive odors and well-stocked with proper supplies and cleaning materials.
5. Take all necessary pest control measures.

[Defendants' Exhibit 1249]

MOTIVA
ENTERPRISES LLC
Shell, Texaco & Saudi Aramco Working Together

**Retailer #:** 550525
**Cost Center #:** 137898

## RETAIL FACILITY LEASE

THIS LEASE is entered into between Motiva Enterprises LLC ("Lessor") whose address is 12700 Northborough Drive, Houston, TX 77067, and SID PRASHAD II ("Lessee") whose address is 48 MADISON STREET, WORCESTER, MA 01608 and is effective on the later of the first day of the month following execution of this Lease by Lessee or the day after the original expiration date printed in Lessee's current lease with Lessor prior to any extensions thereof ("Effective Date").

This Lease is comprised of two parts. PART I sets forth the variable provisions of this Lease and references the applicable articles in PART II that sets forth the general provisions. To the extent there is a conflict between PART I and PART II, the provisions in PART I are controlling.

## PART I

**Article No.**

1(e) Leased Premises are located at: 48 MADISON ST, WORCESTER, MA 01608.

3 This Lease begins on the Effective Date specified above and expires 3 years after the Effective Date on 7/31/03 ("Expiration Date"). Lessee authorizes Lessor to insert in this Lease the date certain for the Expiration Date pursuant to the definition of Effective Date above.

4 Rent: Lessee shall pay Lessor the following monthly base rentals, plus an amount adjusted at the end of each 12-month period as described in this article:

| | |
|---|---|
| Months 1 – 12: | $4,040.00 |
| Months 13 – 24: | $4,278.00 |
| Months 25 – 36: | $4,515.00 |

21 Notice – Underlying lease(s): The Premises are subject to an underlying lease(s) that will expire on N/A; provided, however, the underlying lease(s) may expire earlier upon N/A days notice by Lessor to its landlord(s).

24(b) Key Management Person designated for Lessee if Lessee is a Business Entity or Joint Lessee: _____.

NOTE TO LESSEE: BE SURE TO READ AND UNDERSTAND ALL OF THE PROVISIONS OF PART I AND PART II OF THIS LEASE BEFORE YOU SIGN BELOW.

Executed on the date shown below.

| | |
|---|---|
| | Equiva Services LLC<br>On Behalf Of |
| SID PRASHAD II<br>Retailer | Motiva Enterprises LLC<br>Seller |
| By: /s/ S. Prashad | By: /s/ Linda Paul<br>Linda Paul |
| Title: Dealer | Title: Supervisor Contracts |
| Date: 07/13/00 | Date: 07-24-00 |

## PART II

**1. DEFINITIONS.** As used in this Lease, the terms below have the following meanings, whether singular or plural:

(a) "Alteration" – Any addition, modification, removal, or replacement (except as expressly provided in this Lease) of any building, improvement, or equipment on the Premises.

(b) "Business Entity" – Any legal entity that is not an individual or sole proprietorship, including, without limitation, a partnership, corporation, limited liability company, limited liability partnership, or association.

(c) "Law" – Any applicable statute, constitution, ordinance, regulation, rule, administrative order or other requirement of any federal, state, or local government agency or authority in effect at the time of execution or during the term of this Lease.

(d) "PMPA" – The Petroleum Marketing Practices Act as may be amended from time to time (15 U.S.C. § 2801 *et seq.*).

(e) "Premises" – The land owned or leased by Lessor at the location identified in PART I together with the buildings, improvements, and equipment existing as of the Effective Date of this Lease and located thereon after the Effective Date with Lessor's prior written consent, subject to Lessor's rights under Article 2.

(f) "RSA" – The Retail Sales Agreement entered into between the parties contemporaneously with this Lease.

**2. LEASED PREMISES AND USE.**

(a) Lessor leases the Premises to Lessee under the terms of this Lease. Lessee shall use the Premises

solely for the operation of a motor fuel dispensing station or, if approved by Lessor, an automobile service station, for the uses authorized by Lessor under the RSA. Lessee must obtain Lessor's prior written consent to use the Premises for any use not authorized under this article. If Lessor consents to Lessee's additional use, Lessor reserves the right to a portion of the fees, income or other revenue generated by such use.

(b) Lessor reserves the right to make use of the Premises so long as any such use does not materially interfere with the authorized use of the Premises then being made by Lessee. Without limiting the generality of the foregoing, Lessor's use of the Premises may include (1) the erection of additional buildings or Alterations of the Premises, in accordance with Article 9, to operate a car wash, convenience store, fast food facility, laundry, or any other business or (2) the installation of pay telephones, Automated Teller Machines, and other financial services, advertising signs and outdoor billboards, wireless radio signal devices and related equipment and facilities, video display terminals, computers, vending and other similar equipment. Lessor reserves the right to any fees, income, rentals or other revenue generated by such use or associated facilities.

(c) This Lease is subject to all covenants and restrictions contained in any deed or lease conveying or leasing the Premises to Lessor and all other deed restrictions, zoning laws, easements or encumbrances affecting the Premises, now or after the Effective Date of this Lease. Lessor reserves the right to grant a mortgage or security interest in the fee and leasehold interests affecting the Premises. This Lease is also subject and subordinate to any mortgage affecting the Premises now or after the Effective Date of this Lease provided the mort-

gage contains a "non-disturbance" clause requiring that the mortgagee not disturb the possession of Lessee, its successors, and assigns as long as they are not in default under this Lease. Upon Lessor's request, Lessee shall promptly execute and deliver to Lessor any instrument required by a mortgagee relating to Lessee's subordination of its rights under this Lease. Lessor also reserves the right to grant easements, rights-of-way, and licenses affecting the Premises.

(d) Lessee may not use the underground storage tank ("UST") system, including the associated product lines or motor fuel dispensing equipment provided by Lessor under this Lease to sell motor fuels not bearing a brand licensed to Lessee under the RSA without the prior written consent of Lessor, which consent may be withheld consistent with applicable Law. Lessee's installation and use of any additional tanks and associated equipment for the purpose of selling other motor fuel is subject to Article 9, all other applicable provisions of this Lease, and any related agreements between the parties.

3. **TERM.** The term of this Lease is identified in PART I but is subject to Lessor's termination and nonrenewal rights under Article 19. Neither party has any obligation to renew this Lease, or any extension of this Lease agreed to in writing by the parties, or continue the relationship established hereunder beyond the term provided in this except if required by Law. If by operation or effect of Law Lessor is required to continue its relationship established under this Lease with Lessee beyond the term specified in this article and the parties do not extend or renew this Lease by written instrument, then the term of this Lease will be extended on a month-to-month basis on the same terms and conditions of this Lease for not more than 6 successive months, subject to

(a) termination of this Lease by either party during such extension period in accordance with the notice provisions of Article 26 or (b) nonrenewal by Lessor at the end of any such month.

**4. RENT.**

(a) Lessee shall pay Lessor as monthly rent, without deduction, set off, notice, or demand (1) the base rent set forth in PART I together with (2) the double net expenses set forth in Exhibit A. Lessor may adjust the double net expenses at the end of each 12 month period during the term of this Lease to reflect any changes in these expenses (whether increases or decreases in the amounts) based on the applicable expenses for the previous period(s). If Lessor makes such an adjustment, Lessor shall provide Lessee written notification of the same. In addition, if during the term of this Lease Lessor makes an Alteration (whether a single Alteration or several Alterations as part of a single project) to the Premises of $100,000 or more (which amount may be amended by Lessor from time to time upon written notice to Lessee), upon completion of the Alteration and notification to Lessee, Lessee's rent will be adjusted by Lessor in a manner to reflect Lessor's additional investment in the Premises as reasonably determined by Lessor.

(b) Lessee shall pay Lessor the rent not later than the first day of each month, except that rent due on a weekend or federal holiday is payable on the business day following the due date. Rent for any period less than a calendar month will be prorated.

(c) Lessee shall pay the rent in accordance with Lessor's payment terms in effect from time to time. Lessor may require that Lessee pay the rent by electronic funds transfer initiated by Lessor or by any other meth-

od that Lessor may designate from time to time, and Lessee shall provide any written authorizations required for such purpose. Lessee shall maintain sufficient funds to cover such payment. In addition to any other remedies available to Lessor for Lessee's failure to comply with this article: (1) Lessee shall pay to Lessor a reasonable administrative fee for each instance of payment that Lessee does not have sufficient funds to cover payment and all overdue sums will bear interest at the maximum lawful rate per annum from the date due until paid, (2) Lessor may setoff or equitably recoup against any amount then due Lessee, (3) Lessor may defer further deliveries of the Products sold to Lessee under the RSA until payment of all outstanding indebtedness is made, and (4) Lessor may terminate or non-renew Lessee as set forth in Article 19.

5. **LESSEE'S EFFORTS.** Lessee shall devote Lessee's reasonable efforts to preserve the value of the Premises for the authorized use as specified in Article 2 and the reputation of Lessor by serving effectively and efficiently the needs of the public and consumers. Lessee shall personally and actively manage the business conducted on the Premises to assure good faith compliance with the terms of this Lease.

6. **COMPLIANCE WITH LAWS.** Lessee shall comply with all Laws, licenses, and permits relating to the Premises or any use thereof, including, but not limited to, any special zoning or other governmental restrictions and any Laws pertaining to environmental protection, safety, and health matters.

7. **TAXES, FEES AND OTHER BUSINESS CHARGES.**

(a) Lessee shall pay: (1) all federal, state, and local taxes, excises, duties, and other assessments and

charges, now or hereafter levied, ("Taxes") of any kind and nature assessed by any governmental authority relating to the operation, occupancy, or use of the Premises or business conducted by Lessee thereon including, without limitation, those Taxes measured by income and (2) any other fees or business charges that relate to the Premises or business conducted thereon. Without limiting the generality of the foregoing, any of the Taxes, fees or business charges paid by Lessor that relate to the Premises or business conducted thereon by Lessee including, but not limited to, ad valorem, sales and use, and personal property Taxes on Lessor's property and equipment or any leased property and equipment located on the Premises will be passed on to Lessee as a double net expense.

(b) Unless Lessor elects to do so at Lessee's expense, Lessee shall obtain and maintain, at Lessee's expense and in Lessee's name unless directed by Lessor otherwise, all licenses, registrations, and permits necessary for the operation of Lessee's business on the Premises, including, but not limited to, licenses or fees to operate the UST system on the Premises.

(c) Lessee shall timely pay all utility expenses, including, but not limited to, those relating to water, sewer, gas, telephone, electricity, and power to operate the Premises. Lessee shall transfer, or request the transfer of, all meters and accounts to Lessee's name unless Lessor directs otherwise. Lessee shall pay all other operating expenses relating to the operation of the business on the Premises, including, but not limited to, those relating to waste disposal, pest control, landscape, and snow removal.

(d) If Lessor satisfies any of Lessee's obligations under this article, Lessee shall reimburse Lessor upon

demand for the costs incurred by Lessor in doing so without prejudice to any other rights or remedies available to Lessor under this Lease or at Law.

8. **MAINTENANCE.** As of the Effective Date of this Lease, Lessee acknowledges that the Premises are in good condition and repair. At Lessee's own expense, Lessee shall timely perform the maintenance obligations set forth in Exhibit B, as may be amended by Lessor from time to time upon written notice to Lessee. Lessee shall keep Lessee's own property in good condition and repair. Lessor shall perform all other maintenance to the Premises. Lessee shall pay Lessor an amount for maintenance which will be passed on to Lessee as a double net expense. Notwithstanding Lessor's maintenance obligations, Lessee has the primary obligation to keep the Premises safe for all persons. Accordingly, Lessee shall immediately notify Lessor if any portion of the Premises is in need of maintenance by Lessor and shall perform any necessary interim maintenance to keep the Premises in a safe condition until such time as Lessor is able to do so within a reasonable time after receipt of notice from Lessee. If Lessee fails to perform its maintenance obligations, Lessor may perform those maintenance obligations and will charge to Lessee, in addition to Lessee's maintenance expense described above, Lessor's actual cost in performing the same. If Lessee fails to provide Lessor with any required notice relating to the maintenance of the Premises, Lessee shall be solely responsible for any resulting injury or damage.

9. **ALTERATIONS.**

(a) **Lessor's Alterations.** Except to the extent limited by applicable Law, Lessor may, from time to time, make Alterations to the Premises. The Alteration work may include, without limitation, the modernization,

reconstruction, or remodeling of the buildings, improvements, or equipment on the Premises and may involve the complete demolishing and rebuilding of the same. Lessor shall exercise due diligence to complete the Alteration in an expeditious manner. If Lessee's business is substantially disrupted or changed as a result of the Alteration work, Lessor will not be liable to Lessee for any loss including loss of profit resulting from the conduct of the work or completion delay except that Lessor shall reduce or suspend the rent payable by Lessee during the Alteration work period.

(b) **Lessee's Alterations.** With the exception of Lessee's maintenance obligations identified in Article 8 and Exhibit B, Lessee may not make any Alteration to the Premises without Lessor's prior written consent. Any Alteration authorized by Lessor will be at Lessee's own expense, must be made in accordance with plans and specifications approved by Lessor and any agreement between the parties, and must be performed by a contractor approved by Lessor. Lessee shall, at Lessee's expense, maintain the Alteration in a good and safe condition. If Lessee fails to maintain the Alteration, Lessor may do so and charge Lessee its reasonable expenses. At Lessor's election, upon termination or nonrenewal of the franchise relationship, Transfer of the Lease (as defined in Article 17 below), or as otherwise agreed to by the parties, any Alteration made by Lessee will become a part of the Premises and the property of Lessor, without any cost to Lessor. In the alternative, upon written notice to Lessee, Lessor may require that Lessee, within 30 days after termination or nonrenewal of the franchise relationship, remove any Alteration and restore the Premises to the condition prior to making the Alteration.

**10. RELEASE DETECTION AND INVENTORY CONTROL.**

(a) To assure early detection of any release from the UST system on the Premises, Lessee shall use a method or combination of methods of release detection in accordance with Lessor's procedures, as may be amended by Lessor from time to time, and applicable Law. If Lessor amends these procedures, Lessor shall provide Lessee with written notice of the same. Lessee shall also maintain a methodical daily inventory control program for motor fuel, including daily reconciliation of inventory readings with sales records and delivery receipts in accordance with Lessor's procedures and applicable Law. Lessee shall provide Lessor with immediate notice by telephone (promptly confirmed in writing) of any suspected release, of any claim or threatened claim by any third party related to a release or alleged release, or of any newly discovered material fact relating to any matter previously reported pursuant to this article. Without limiting the generality of the foregoing, Lessee shall provide Lessor with notice by telephone (promptly confirmed in writing) of any inventory discrepancy for a single product (loss or gain) in excess of: (1) 300 gallons for a single day; (2) 150 gallons per day for 3 consecutive days; or (3) 1% of sales plus 130 gallons for any 30-day period. Lessor may, from time to time, require Lessee to provide Lessor periodic written certifications that Lessee has complied with the provisions of this article.

(b) Lessee shall comply with all recordkeeping requirements of Lessor and applicable Law. Lessee shall retain for at least 3 years from the date of each sale of the motor fuel to Lessee's customers, and make available for Lessor's inspection and audit at all reasonable times,

Lessee's records and procedures maintained in accordance with this article.

(c) If Lessee fails to perform in a proper and timely manner Lessee's obligations under this article, in addition to any other rights or remedies Lessor may have under this Lease or Law, Lessor may retain the services of a qualified independent third party to inspect and audit Lessee's performance as frequently as necessary, at Lessee's sole expense, until such deficiencies are cured.

**11. SECURITY.** Lessee shall be solely responsible for the security at the Premises and shall operate and maintain the Premises in a secure manner so that criminal activity is adequately deterred from occurring at the Premises and all persons are adequately protected from injury, harm, or loss. Any security measures and devices not existing on the Premises at the time of execution of this Lease, including, but not limited to, pass-through drawers, bullet resistant enclosures, mirrors, locks, alarm systems, [and] camera systems deemed necessary by Lessee to meet Lessee's obligations under this article must be purchased, installed, and maintained at Lessee's sole discretion and expense, subject to Article 9(b).

**12. RIGHT OF ENTRY.** Lessor, its agents, and representatives may enter the Premises at all reasonable times to inspect the Premises, perform any maintenance, make Alterations, and verify Lessee's compliance with this Lease.

**13. EXCUSES FOR NONPERFORMANCE.** Both parties will be excused from their obligations under this Lease (except for financial obligations) to the extent that performance is delayed or prevented by any of the following matters: circumstances reasonably beyond the parties' control; fire, explosion, flood, ice storm, snowstorm, or earthquake; delay or loss of transportation or

delivery equipment; mechanical breakdown; strikes or other labor trouble, plant shutdown, riots, or other civil disturbances; or voluntary or involuntary compliance with any Law or request of any governmental authority.

**14. INDEMNITY.**

(a) TO THE EXTENT PERMITTED BY LAW, LESSEE SHALL INDEMNIFY AND DEFEND LESSOR, ITS MEMBERS, SUBSIDIARIES, AFFILIATES AND JOINT VENTURE PARTNERS, AND THEIR RESPECTIVE DIRECTORS, OFFICERS, EMPLOYEES, AND AGENTS ("INDEMNIFIED PARTIES") AGAINST ALL CLAIMS, DEMANDS, CAUSES OF ACTION, SUITS, DAMAGES, JUDGMENTS, LIENS, PENALTIES, AND EXPENSES INCLUDING, WITHOUT LIMITATION, ATTORNEYS' FEES AND LITIGATION COSTS, WHETHER INCURRED FOR AN INDEMNIFIED PARTY'S PRIMARY DEFENSE OR FOR ENFORCEMENT OF ITS INDEMNIFICATION RIGHTS (COLLECTIVELY, "CLAIM"), INCLUDING, WITHOUT LIMITATION, ANY CLAIM FOR HARM, INJURY, OR DEATH TO ANY PERSON, OR DAMAGE TO PROPERTY OR TO THE ENVIRONMENT ARISING OUT OF OR IN CONNECTION WITH ANY OF THE FOLLOWING MATTERS:

(1) LESSEE'S PERFORMANCE OR NONPERFORMANCE UNDER THIS LEASE;

(2) ANY ACTION OR OMISSION OF LESSEE, LESSEE'S EMPLOYEES, AGENTS, CONTRACTORS, ASSIGNS OR THIRD PARTIES; AND

(3) THE OPERATION OF LESSEE'S BUSINESS.

LESSEE'S OBLIGATION TO INDEMNIFY AND DEFEND EXTENDS TO ANY CLAIM CAUSED BY THE CONCURRENT OR CONTRIBUTORY NEGLIGENCE OR FAULT OF AN INDEMNIFIED PARTY BUT NOT TO ANY CLAIM SHOWN BY FINAL NONAPPEALABLE JUDGMENT TO HAVE BEEN CAUSED BY THE INDEMNIFIED PARTY'S SOLE NEGLIGENCE.

(b) WITHIN 24 HOURS AFTER THE OCCURRENCE OF WHICH MAY RESULT IN A CLAIM, LESSEE SHALL REPORT THE SAME TO LESSOR BY TELEPHONE AND SHALL PROMPTLY THEREAFTER CONFIRM THE SAME BY WRITTEN NOTICE, INCLUDING ALL CIRCUMSTANCES THEREOF KNOWN TO LESSEE OR LESSEE'S EMPLOYEES.

(c) PROMPTLY AFTER RECEIVING NOTICE, AT LESSEE'S EXPENSE, LESSEE SHALL INVESTIGATE, RESPOND TO, AND DEFEND ANY CLAIM ASSERTED AGAINST ANY INDEMNIFIED PARTY, INCLUDING, WITHOUT LIMITATION, ANY CLAIM ALLEGING THE INDEMNIFIED PARTY'S SOLE NEGLIGENCE. THE INDEMNIFIED PARTY MAY PARTICIPATE IN THE DEFENSE AND SETTLEMENT OF ANY CLAIM OR LITIGATION WITH ATTORNEYS OF THE INDEMNIFIED PARTY'S SELECTION WITHOUT RELIEVING LESSEE OF ANY OBLIGATIONS UNDER THIS ARTICLE. LESSOR SHALL REIMBURSE LESSEE FOR THE AMOUNT OF ANY JUDGMENT AND REASONABLE DEFENSE COSTS PAID BY LESSEE WHICH REPRESENTS THE TOTAL LIABILITY FOUND BY FINAL NONAPPEALABLE

JUDGMENT TO HAVE BEEN CAUSED BY THE INDEMNIFIED PARTY'S SOLE NEGLIGENCE.

(d) THE INSURANCE REQUIREMENTS OF ARTICLE 15 DO NOT LIMIT OR RESTRICT IN ANY WAY LESSEE'S OBLIGATIONS UNDER THIS ARTICLE.

(e) LESSEE'S OBLIGATIONS UNDER THIS ARTICLE SURVIVE TERMINATION OR NONRENEWAL OF THIS LEASE.

**15. INSURANCE.**

(a) Lessee shall maintain, at its sole cost, at all times during the term of this Lease, the following insurance coverage with providers satisfactory to Lessor with limits not less than those limits below (the "Insurance"):

(1) Garage Insurance with limits of $1,000,000 each occurrence and $1,000,000 general aggregate and Garagekeepers Legal Liability Insurance with a limit of $50,000 each occurrence, such policy to include endorsement GL 20 10 Broadened Coverage, with Fire Legal Liability limits of $300,000 each occurrence. Lessees owning or operating up to and including 3 locations are subject to the minimum limits above. Lessees owning or operating 4 up to and including 5 locations shall amend their Garage policy aggregate to $3,000,000. Lessees owning or operating 6 or more locations shall amend their Garage policy aggregate to $5,000,000. In lieu of amending aggregate limits as described in this article, endorsement CG 2504 or its equivalent amending aggregate limits per location may be utilized when applied to the above described minimum limits. Limits in excess of $1,000,000 may be provided by Excess or Umbrella Liability coverage. This Insurance is only required for those locations engaged in automotive repairs, and should be

used in lieu of Commercial General Liability insurance in Article 15(a)(2) below. As applicable, Lessee shall maintain the following:

(i) Liquor Liability Insurance if Lessee owns or operates the location and alcoholic beverages are sold at the location, utilizing endorsement CG 24 08 or its equivalent.

(ii) Marine Terminal or Wharfingers Liability Insurance if Lessee operates a marine facility. If Lessee supplies the marine facility via watercraft the watercraft exclusion must be deleted or equivalent coverage purchased.

(2) Commercial General Liability Insurance unamended or Comprehensive General Liability Insurance with Broad Form CGL endorsement with limits of $1,000,000 each occurrence and $1,000,000 general aggregate, with Fire Legal Liability limits of $300,000 each occurrence. Lessees owning or operating up to and including 3 locations are subject to the minimum limit above. Lessees owning or operating 4 up to and including 5 locations shall amend their policy aggregate to $3,000,000. Lessees owning or operating 6 or more locations shall amend their policy aggregate to $5,000,000. In lieu of amending aggregate limits as described in this article, endorsement CG 2504 amending aggregate limits per location may be utilized when applied to the above-described minimum limits. Limits in excess of $1,000,000 may be provided by Excess Liability or Umbrella Liability coverage. As applicable, Lessee shall maintain the following:

(i) Liquor Liability Insurance if Lessee owns or operates the location and alcoholic beverages are sold thereon, utilizing endorsement CG 24 08 or its equivalent.

(ii) Marine Terminal or Wharfingers Liability Insurance if Lessee operates a marine facility. If Lessee supplies the marine facility via watercraft the watercraft exclusion must be deleted or equivalent coverage purchased.

(3) Business Automobile Liability Insurance covering all vehicles used in the operations of the Lessee with limits of liability of: Bodily injury $1,000,000 each person, $1,000,000 each accident; Property damage $1,000,000; or a Combined Single Limit of $1,000,000 for bodily injury and property damage, such policy to be endorsed with MCS-90 when hazardous material transportation is involved.

(4) Workers' Compensation Insurance and Longshoremen's and Harborworkers' Compensation Insurance as required by Laws applicable to and covering employees of Lessee during the term of this Lease.

(5) Employers' Liability Insurance protecting Lessee against common law liability, in the absence of statutory liability, for employee bodily injury arising out of the master-servant relationship with a limit of $500,000 Each Accident, $500,000 Disease – Policy Limit; $500,000 Disease – Each Employee.

(b) Lessee shall assure that the Insurance policies: (1) provide a waiver of subrogation in favor of Lessor where permissible by Law, (2) allow for the separation of insureds, and (3) provide for written notice of cancellation or material change. Notice of cancellation or change will not affect the Insurance until 30 days after Lessor receives written notice. Any deductible or retention of insurable risks will be for the Lessee's account.

(c) Lessee shall assure that the Insurance required in this article and each certificate evidencing the

Insurance issued to Lessee names Lessor and its members, subsidiaries, affiliates and joint venture partners, to the extent of their interest, and, where applicable, Lessor's landlord and any mortgagee, as additional insureds (Article 15(a)(1) and (2) as applicable), without regard to the allocation of liability provisions contained in this Lease, to the extent of any claim, loss or liability within the scope of the required Insurance. The parties intend that, to the extent of their interest, the status of Lessor and its members, subsidiaries, affiliates and joint venture partners as additional insureds will not be limited. Lessee shall secure from its insurance companies and provide to Lessor, for all required Insurance (Article 15(a)(1) and (2) as applicable), an additional insured endorsement with terms equivalent to ISO Form CG 20 26 11 85.

(d) Within 30 days after the execution of this Lease and during the term of this Lease as necessary, Lessee shall provide Lessor with a certificate of Insurance evidencing Lessee's compliance with Lessor's Insurance requirements. Lessee's failure to provide certificates evidencing the requirements or purchase Insurance coverage in compliance with this article will not relieve Lessee of its obligations in this article.

**16. CASUALTY LOSS AND DAMAGE.**

(a) Lessee shall comply with Lessor's Casualty Loss standards and procedures as may be amended by Lessor from time to time. If Lessor amends the standards and procedures, Lessor shall provide Lessee with written notice. For the purpose of this article, "Casualty Loss" means any repair or replacement that needs to be made to the Premises as the result of damage or vandalism caused by: (1) any act or omission of any third party, including, without limitation, Lessee's customers, vendors, and contractors, or (2) an act of God.

(b) Lessee is responsible for all damage to the Premises caused by Lessee's acts or omissions and shall make any repairs or replacements necessary, at Lessee's sole expense, as a result of such acts or omissions. If Lessee fails to make the repair or replacement, Lessor may do so and will charge Lessee for the same, which will be in addition to Lessee's maintenance expense as described in Article 8.

(c) Lessee shall reimburse Lessor for unrecovered Casualty Loss up to a maximum of the first $5000 (including taxes and the costs of collection) per incident. Lessor shall use its reasonable efforts to recover damages caused by Casualty Loss and Lessee shall cooperate with Lessor in doing so.

**17. LIMITATION OF LIABILITY.** Neither party is liable to the other party for any indirect, special, incidental, consequential, or punitive damages arising under this Lease whether under tort, contract, strict liability, warranty, statute, or otherwise.

**18. ASSIGNMENTS, ENCUMBRANCES, AND RIGHT OF FIRST REFUSAL.**

(a) **Assignment by Lessee.** This Lease is personal to Lessee. If Lessor elects not to exercise Lessor's right of first refusal as set forth below, Lessee may sell, transfer, encumber, or assign its interest under this Lease, in whole or in part, sublease any portion of the Premises, or permit any other person to occupy or use all or any part of the Premises, whether voluntarily, involuntarily, or by operation of Law (collectively, "Transfer") with the prior written consent of Lessor, which consent may be withheld consistent with applicable Law. Notwithstanding the foregoing, Lessee may only Transfer its interest under this Lease as it pertains to the operation of a motor fuel dispensing station or automobile service

station, as the case may be, and any facilities for uses otherwise authorized under the RSA revert back to Lessor, at Lessor's sole discretion. Lessor's consent to Transfer may be conditioned upon, but not limited to, the (1) proposed transferee satisfying all of Lessor's then current requirements for the qualification of new lessees; (2) Lessee satisfying all indebtedness owed by Lessee to Lessor; and (3) proposed transferee agreeing to be bound by all the terms and conditions of this Lease. Lessor will have 60 days (or any lesser period specified by Law), after receipt of Lessee's request for Lessor's consent to Transfer and all qualification information reasonably required by Lessor, to provide Lessee with written notice of its decision to grant or withhold consent. Lessor's consent to any Transfer is not a waiver of the provisions of this article as to any future transaction. Any Transfer by Lessee without Lessor's prior written consent is void.

(b) **Trial Franchise.** Except to the extent limited by applicable Law, if Lessee desires to Transfer its interest in this Lease to an individual or Business Entity that has not previously operated as a retailer of petroleum products of Lessor or Lessor's affiliates, then Lessee may be required to execute a mutual termination of this Lease and the proposed transferee may be required to execute a trial franchise agreement as a condition to Lessor granting its consent to the Transfer.

(c) **Transfer Events.** Without limiting the generality of the foregoing, the following events constitute a Transfer:

(1) Lessee dies and Lessee's interest in this Lease is transferred, whether by will or operation of Law;

(2) Lessee becomes bankrupt or insolvent, Lessee makes an assignment for the benefit of creditors,

or a proceeding is instituted under the Bankruptcy Code and, if it is an involuntary proceeding, Lessee or other affected party has not had it dismissed within 60 days;

(3) A writ of attachment or execution is levied on this Lease and not removed by Lessee within 30 days;

(4) A receiver is appointed with authority to take possession of the Premises and is not removed within 60 days in any proceeding or action to which Lessee is a party;

(5) If Lessee is a limited liability partnership or partnership, a withdrawal or any change of interest (voluntary, involuntary, or by operation of Law) of any partner or the dissolution of the partnership;

(6) If Lessee is a limited liability company or a corporation, any dissolution, merger, consolidation or other reorganization, or other arrangement having similar effect, or the sale or transfer by Lessee or any member or shareholder of 10% or more of the voting shares of the capital stock of Lessee or of any lesser interest which cumulatively vests 10% or more of such voting shares in the transferee; and

(7) If Lessee is comprised of more than one person, any change of interest (voluntary, involuntary or by operation of Law) of any such person.

(d) **Right of First Refusal**. If Lessee receives a bona fide offer from a third party to purchase Lessee's interest in this Lease, Lessee may not Transfer any of Lessee's interest in this Lease without first offering, in writing, to Transfer the same to Lessor or its designee on terms and conditions which are the same as those of the proposed Transfer to a third party. Lessor will have 30 days after receipt of the offer and of a complete and exact copy of the third party offer to accept or reject the offer.

If Lessor rejects the offer and consents to the Transfer as set forth in Article 18(a), Lessee may make the proposed Transfer to the third party, but not at a lower price or on more favorable terms than those offered to Lessor. If such Transfer is not consummated within 4 months from the expiration of the 30-day period, Lessee shall re-offer the interest to Lessor in accordance with the foregoing provisions.

**(e) Transfer Fee.**

(1) Except for lessees in New Hampshire or Virginia which will be governed by applicable state Law, to the maximum extent permitted by Law, Lessee shall pay to Lessor a franchise transfer fee ("Transfer Fee") in the form of a bank cashiers check prior to or at the closing of any Transfer. With the exception of a Transfer in the event of Lessee's death, long term disability, or sickness (6 months or more) that prevents Lessee from operating the business at the Premises, the Transfer Fee is applicable to all Transfers, including a Transfer to the Lessor. If Lessee Transfers any stock, the Transfer Fee will be prorated based on the number of shares transferred.

(2) For purposes of calculating the Transfer Fee as set forth below, the "Gross Sales Price" is the value of any consideration received excluding the value of the inventory and equipment. At the time of closing, the transferee and Lessee shall execute an Affidavit of Consideration certifying the Gross Sales Price and assigning values to the equipment and inventory based on the last invoice from Lessor for the motor fuel and retail cost for the other inventory. If Lessor, in the exercise of reasonable judgment, disagrees with the equipment values, Lessor may require that the transferee obtain an appraisal of the equipment. Lessor shall provide the trans-

feree with the names of 3 Member Appraisal Institute (M.A.I.) appraisers. If the appraised value on the equipment is greater than or equal to the assigned value by the transferee, Lessor shall pay for the appraisal. If the appraised value of the equipment is less than the assigned value, the transferee shall pay for the appraisal. The appraisal will be conclusive for establishing the value of the equipment.

(3) With the exception of a Transfer by Lessee's Designee as defined in the RSA, the amount of the Transfer Fee will be the greater of $6500 or the amount arrived at by multiplying the difference between the baseline Gross Sales Price (the price Lessee paid for the business originally) and the Gross Sales Price for the current Transfer by the applicable percentage below (which is based upon the year Lessee makes the Transfer).

(i) Less than 3 years at 35%

(ii) 3 years to less than 6 years at 20%

(iii) 6 years to less than 9 years at 15%

(iv) 9 years or more at 0%

For any Transfer by Lessee's Designee, the Transfer Fee will be $6500.

(f) **No Liens**. Except to the extent permitted under this article, Lessee shall keep the Premises and Lessee's interest in this Lease free and clear of all liens, claims, or other encumbrances. Lessee shall discharge any mechanic's, laborer's, or materialman's lien on account of labor, materials, or services performed or supplied to Lessee, or any security agreement, conditional bill of sale, chattel mortgage, or other agreement on account of personal property furnished or leased to Lessee. Lessee shall reimburse Lessor for any costs and ex-

penses, including attorneys' fees and costs, which are incurred as a result of the violation of the provisions of this article.

(g) **Assignment by Lessor**. Lessor may Transfer its interest, in whole or in part, in this Lease or in the Premises.

**19. TERMINATION OR NONRENEWAL.**

(a) **Termination by Lessor**. Subject to any limitations imposed by Law, and in addition to all other rights or remedies available, Lessor may terminate this Lease for any of the following grounds.

(1) Lessee's failure to comply with any provision of this Lease, which provision is both reasonable and of material significance to the relationship under this Lease;

(2) Lessee's failure to exert good faith efforts to carry out the provisions of this Lease;

(3) The occurrence of an event which is relevant to the relationship under this Lease and as a result of which termination of this Lease is reasonable, including, without limitation, the following events:

(i) Lessee's fraud or criminal misconduct relevant to the operation of the Premises;

(ii) Lessee's declaration of bankruptcy or judicial determination of insolvency;

(iii) Lessee's continuing severe physical or mental disability if Lessee is an individual, or if Lessee is a partnership or corporation, the disability of any individual who is currently in "control" of the ownership interest of Lessee ("control" being the authority to direct the operations of Lessee and to have or exercise management responsibility), of at least 3 months' duration

that renders Lessee unable to provide for the continued proper operation of the Premises;

(iv) Loss of Lessor's right to grant possession of the Premises through expiration of an underlying lease;

(v) Condemnation or other taking, in whole or in part, of the Premises pursuant to the power of eminent domain;

(vi) Destruction (other than by Lessor) of all or a substantial part of the Premises;

(vii) Lessee's failure to pay Lessor in a timely manner when due rent and all other sums to which Lessor is legally entitled, including, without limitation, any sums due Lessor under the RSA;

(viii) Lessee's failure to operate the Premises for 7 consecutive days, or such lesser period which under the facts and circumstances constitutes an unreasonable period of time;

(ix) Lessee's willful adulteration, mislabeling, or misbranding of motor fuels or other trademark violations;

(x) Lessee's knowing failure to comply with the Laws relevant to the operation of the Premises;

(xi) Lessee's conviction of any felony involving moral turpitude;

(xii) Lessee's death if Lessee is an individual, or if Lessee is a partnership or corporation, the death of any individual who is currently in "control" of the ownership interest of Lessee ("control" being the authority to direct the operations of Lessee and to have or exercise management responsibility); and

(xiii) Lessee's failure to comply with the Insurance requirements under Article 15.

(4) A determination is made by Lessor in good faith and in the normal course of business to withdraw from marketing of motor fuel through retail outlets in the relevant geographic market area in which the Premises are located;

(5) Termination of the RSA; or

(6) Any other ground for which termination is provided for in this Lease or is otherwise allowed by the PMPA or other applicable Law.

(b) **Termination Prior to Effective Date**. If after execution but prior to the Effective Date of this Lease Lessor has grounds to terminate or not renew any then existing Retail Facility Lease between the parties, or to terminate this Lease as if it were then in its term, Lessor may terminate this Lease, as well as any existing Retail Facility Lease, based on those grounds.

(c) **Nonrenewal by Lessor**. Subject to any limitations imposed by Law, and in addition to all other rights or remedies available, Lessor may not renew this Lease for any of the following grounds.

(1) Any of the grounds specified in Article 19(a);

(2) Nonrenewal of the RSA; or

(3) Any other ground for which nonrenewal is provided for in this Lease or is otherwise allowed by the PMPA or other applicable Law.

(d) **Termination for Changed Laws**. Lessor may terminate this Lease, upon notice to Lessee, if any Law operates to prevent the continued use or occupancy of the Premises (either directly or by requiring an Al-

teration at a cost which is disproportionate to the value of the Premises for the continued use or occupancy) for the purpose for which the Premises were being used immediately prior to the effective date, application, or enforcement of the Law, as the case may be.

(e) **Mutual Termination.** The parties may terminate or not renew this Lease by mutual written agreement in the form and manner permitted by the PMPA.

(f) **Repudiation of Prior Lessee's Mutual Termination.** Lessor and Lessee may have executed this Lease prior to the actual Effective Date of this Lease to provide Lessee early possession of the Premises. In consideration thereof, Lessee acknowledges that Lessor may terminate this Lease immediately upon notice to Lessee if the existing (or prior) lessee at the Premises repudiates the mutual termination agreement executed by that lessee and Lessor within the period provided under the PMPA.

**20. RIGHTS AND DUTIES UPON TERMINATION OR NONRENEWAL.**

(a) Upon termination or nonrenewal of this Lease, Lessee shall peaceably surrender the Premises to Lessor. The Premises must be surrendered to Lessor in as good condition as when received, ordinary wear and tear excepted. If necessary, Lessor may re-enter and repossess the Premises without affecting any other rights or remedies available to Lessor under this Lease or otherwise.

(b) If Lessee fails to remove any of Lessee's property upon termination or nonrenewal of this Lease, or any Lessee Alteration Lessor requests Lessee to remove within 30 days after termination or nonrenewal of this Lease, Lessor may: (1) sell all or any part of the same for

Lessee's account on such terms as Lessor may desire and apply the proceeds of the sale, after reimbursing itself for the costs thereof; to the payment of any indebtedness of Lessee and (2) purchase any or all such personal property on such reasonable terms as Lessor may desire. If Lessee fails to restore the Premises after removal of Lessee's property or Alteration, Lessor may restore the Premises and charge Lessee for the expenses involved in doing so.

(c) In addition to Lessor's rights under Article 20(b), Lessor will be entitled to compensation, as liquidated damages and not as a penalty, in the amount of $300.00 per day from Lessee from the date of termination or nonrenewal of this Lease until the date of final removal of Lessee's property and restoration of the Premises by Lessor or Lessee, as the case may be.

**21. UNDERLYING LEASE.** If indicated in PART I that Lessor does not own the Premises the following provisions apply.

(a) Lessee acknowledges that Lessor does not own the land or improvements covered by this Lease but leases the land from a third party under an underlying lease that will expire on the date set forth in PART I. Lessee is also notified that, upon expiration, Lessor's underlying lease may not be extended or renewed on that date, with the result that this Lease may be terminated prior to, or not renewed at, the end of the term. If Lessor's underlying lease is extended or renewed beyond the date stated in PART I, then this Lease will continue in effect or be renewed, as the case may be, provided other grounds for termination or nonrenewal do not then exist.

(b) This Lease is subject to all conditions and restrictions affecting the underlying lease under which Lessor is now or hereafter entitled to possession. Lessee

shall not commit or permit any act or omission that would impair or jeopardize Lessor's interest under the underlying lease.

**22. CONDEMNATION.** If all or any part of the Premises is condemned for public or quasi-public use, or if Lessor agrees to execute a voluntary conveyance in lieu of condemnation, either party may terminate this Lease by giving the other prior notice. Lessor, not Lessee by virtue of this Lease, will be entitled to any condemnation award or payment in exchange for a voluntary conveyance, and Lessee assigns to Lessor all of Lessee's right to or interest in any award or settlement subject to any applicable requirements of the PMPA. Nothing in this Lease, however, precludes Lessee from pursuing a claim Lessee may have directly against the condemning authority under applicable Law to receive compensation for business relocation expense or for loss of business opportunity or good will. If this Lease is not terminated because less than all of the Premises is condemned, the condemnation will not affect the obligation of Lessee to pay the full rental and to perform all of Lessee's obligations under this Lease.

**23. INDEPENDENT CONTRACTOR.** Lessee is an independent contractor and Lessor has no right to exercise control or direction over any aspect of the Lessee's business or the operations conducted on the Premises. No provision in this Lease is intended to interfere with or diminish Lessee's complete control over and sole responsibility for the health, safety, and security matters at the Premises. This Lease does not establish any partnership, joint venture, employment, or agency between the parties or Lessee's employees or agents.

**24. BUSINESS ENTITY OR JOINT LESSEE.**

(a) If Lessee is comprised of more than one person, the obligations imposed under this Lease are joint and several as to each person and all of the terms apply to each person with the same effect as though that person were the sole Lessee.

(b) If Lessee is a Business Entity, all obligations under this Lease of a personal nature apply as if the Business Entity were an individual and, insofar as is legally possible and reasonably practicable, to those individuals who have or exercise management responsibility for the Business Entity, including, but not limited to, officers, directors or agents of corporations and partners of partnerships. The Business Entity must manage its affairs with respect to the personal obligations in a manner so as to give full force and effect to the same. Subject to Lessor's prior written approval, Lessee shall designate a Key Management Person as identified in PART I. Lessee may change Lessee's Key Management Person upon Lessor's prior written approval. If Lessee's Key Management Person exercises primary management responsibility for Lessee's day-to-day operations, Lessor may look to the Key Management Person in connection with the performance of the personal obligations.

**25. ACTS ATTRIBUTABLE TO LESSEE.** The acts or omissions of Lessee's employees and agents are the acts or omissions of Lessee. If Lessee is comprised of more than one person the acts or omissions of each such person are the acts or omissions of Lessee. If Lessee is a Business Entity, in addition to those persons mentioned above, the acts or omissions of the Key Management Person designated in PART I and of each partner, shareholder or member, as the case may be, will be considered the acts or omissions of Lessee.

**26. NOTICES.**

(a) Except as otherwise specified in this Lease, all notices must be in writing and in compliance with the PMPA and other applicable Law. Subject to any requirements of Law, any notice may be given to Lessee by personal service or to either party by certified mail, regular mail, telegram, facsimile, mailgram, or overnight or local courier. Notice will be deemed given when: (1) deposited in the U.S. Mail, postage or charges pre-paid and directed to the party for whom intended at the address in this Lease or such other address as directed by the party upon written notice to the other if given by certified mail or regular mail; (2) deposited with the dispatching agency, postage or charges pre-paid and directed to the party for whom intended at the address in this Lease or such other address as directed by the party upon written notice to the other if given by telegram, mailgram or overnight or local courier; or (3) confirmation is received by the sending party if given by facsimile.

(b) If Lessee is a Business Entity, Lessor may give notice to: (1) the Key Management Person; (2) any officer or director of a corporation or limited liability company; (3) any partner of a partnership or limited liability partnership; or (4) any personal representative, agent, or employee of any other Business Entity.

**27. ALTERNATIVE DISPUTE RESOLUTION.** Except for an action brought by Lessor to enforce a termination or nonrenewal of this Lease or to collect indebtedness, if a dispute arises between the parties concerning their respective rights under this Lease, and where commercially reasonable and practicable, the parties shall seek to resolve the dispute by using an appropriate form of alternative dispute resolution prior to initiating litigation proceedings. If the parties are unable to

reach resolution within 60 days following notice of a written claim, either party may initiate litigation proceedings. Except for an action brought by Lessor to collect indebtedness, neither party, however, may institute court proceedings against the other more than one year after the incident giving rise to the claim.

**28. RELEASE.**

THE PARTIES RELEASE EACH OTHER, THEIR RESPECTIVE MEMBERS, SUBSIDIARIES, AFFILIATES AND JOINT VENTURE PARTNERS, AND THEIR RESPECTIVE DIRECTORS, OFFICERS, EMPLOYEES, AND AGENTS AS OF THE EFFECTIVE DATE OF THIS LEASE AND TO THE EXTENT PERMITTED BY LAW, FROM ALL CLAIMS WHICH EACH PARTY MAY HAVE AGAINST THE OTHER (WHETHER OR NOT NOW KNOWN), ARISING DIRECTLY OR INDIRECTLY OUT OF OR IN CONNECTION WITH ANY PRIOR LEASE, EXCEPTING, HOWEVER, CLAIMS OF LESSOR AGAINST LESSEE FOR INDEBTEDNESS, REIMBURSEMENT, OR INDEMNIFICATION. LESSEE UNDERSTANDS THAT THIS RELEASE WAIVES ANY LIMITATION WITH REGARD TO A GENERAL RELEASE THAT MAY EXIST UNDER APPLICABLE LAW AND THAT EVEN IF LESSEE OR LESSOR SHOULD LATER BECOME AWARE OF A CLAIM ARISING OUT OF EVENTS OR CIRCUMSTANCES NOT NOW KNOWN OR SUSPECTED TO EXIST, LESSEE OR LESSOR, AS THE CASE MAY BE WILL NOT BE ABLE TO ASSERT SUCH CLAIM AGAINST THE OTHER.

**29. ATTORNEY'S FEES.** Lessor will be entitled to recover from Lessee reasonable attorney's fees and other

legal costs Lessor incurs in order to secure or protect the rights inuring to Lessor under this Lease, or to enforce [*sic*]

**30. GENERAL PROVISIONS.**

(a) This Lease as of the Effective Date hereof cancels and supersedes all prior and contemporaneous representations, inducements, agreements, commitments, and undertakings with respect to the subject matter of this Lease, except those written agreements relating to any indemnification, reimbursement, indebtedness, or debt security obligations (including, but not limited to, any security interest, security agreement, guaranty, mortgage, deed of trust, promissory note, or UCC filing).

(b) Except as expressly provided under this Lease, this Lease may be amended or supplemented only in a writing signed by both parties.

(c) Any waiver of any provision of this Lease must be in writing signed by the parties. Delay or failure by either party of its right to enforce any provision of this Lease, and course of dealing, or trade custom or usage will not operate as a waiver of compliance with that provision or a waiver or estoppel of the party's right to enforce any other provision of this Lease.

(d) The provisions of this Lease are severable. If any provision of this Lease is, for any reason, invalid or unenforceable, the remaining provisions of this Lease are valid and enforceable if the basic intent of the parties is still capable of being achieved.

(e) This Lease is binding upon and enforceable against the parties' respective successors, permitted assignees, legal representatives, executors, administrators, heirs, and legatees.

(f) Neither this Lease nor any subsequent agreement amending or supplementing this Lease is binding on Lessor unless a duly authorized representative of Lessor [*sic*] the Lease, amendment, or supplement.

**Exhibit A**

**Double Net Monthly Rental Expenses**

| | | |
|---|---|---|
| Maintenance | Months 1-12: | $1,050.00 |
| | Months 13-24: | $1,082.00 |
| | Months 25-36: | $1,114.00 |

Ad valorem Taxes: $1,005.00 plus those other Taxes, fees, and business charges described in Article 7.

## Exhibit B
## Lessee's Maintenance Obligations

**A. Yard**

1. Maintain, including replacement as necessary, all landscaping as necessary to retain a healthy and attractive appearance. Items include, but are not limited to, all live and artificial plantings (shrubs, grass, flowers, trees, etc.), decorative rock, mulch and bark.

2. Repair or replace, as necessary, the entire yard sprinkler system, including, but not limited to, timers, backflow preventers (see Plumbing section), heads, piping, and rain sensors. Lessee shall drain system as necessary to prevent from freezing.

3. Regularly remove weeds, leaves, debris and litter from the Premises (including adjacent sidewalks, driveways and easements).

4. Remove snow and ice from the Premises (including adjacent sidewalks, driveways and easements).

**B. Lighting – Interior**

Repair or replace, as necessary, all lamps and bulbs, neons, transformers, ballasts, ballast wiring, starters, reflectors, lenses, grilles and sockets in the interior of all buildings.

**C. Plumbing**

1. Clear clogged toilets, sinks, building lube bay drains and on-property sewer lines. Clean oil separators and catch basins.

2. Repair or replace, as necessary, all flush mechanisms and faucets (excluding those in public restrooms).

3. Drain water lines to prevent freezing.

4. Empty septic tanks, water reclaim tanks for car-wash and cesspools as necessary. Empty and clean yard catch basins as necessary.

5. Repair or replace, as necessary, all hose bibbs.

6. Repair or replace, as necessary, all backflow preventers. Pay for and have performed periodic testing of backflow preventers as required by regulating authority.

7. Repair or replace, as necessary, water wells and pumps. Excludes drilling of a new water well.

8. Repair or replace, as necessary, all water heaters.

**D. Heating/Air Conditioning**

1. Repair or replace, as necessary, all components of heating and air conditioning system including, but not limited to, filters, controls, condensers, compressors, and wiring. Excludes total system replacement except for window/wall units. Provide seasonal preventive maintenance as required, but at least annually. System types include, but are not be limited to, forced air, hot water, steam, radiant, car wash entrance/exit mat or window/wall units.

2. Repair or replace, as necessary, all components of swamp coolers, including total system replacement.

**E. Glasswork**

Repair or replace, as necessary, all window and door glass, whenever scratched, cracked or broken from whatever cause. Includes bullet-resistant glass or plastic.

**F. Floors**

Restore floors to original condition upon removal of equipment installed by or at request of Lessee, subject to normal wear and tear.

**G. Painting**

During the interval between periodic general repainting by Lessor, wash and paint all curbs, yard and building equipment, lifts, interior/exterior walls, doors, ceilings and shelving as necessary. Lessor shall furnish paint that meets Lessor's specifications.

**H. Tanks**

1. Check underground motor fuel storage tanks daily for water in accordance with Lessor's procedures.

2. Empty waste oil tank as necessary using legally acceptable method of disposal.

3. Pump out and dispose of water in waste oil or heating oil tank as required using legally acceptable method of disposal.

4. Keep fills and access boxes clear of ice, snow, water and debris.

**I. Pumps/Dispensers**

1. Lubricate any motor fuel suction pumps in use (where motor and pump are contained in dispenser housing). Lubricate suction pump weekly or per manufacturer's recommendations.

2. Repair or replace, as necessary, all hanging hardware for fuel pumps or dispensers. Hanging hardware includes, but is not limited to, whip hoses, breakaways, flow restrictors in the hose assembly, hoses, nozzles, nozzle spouts, swivels, splash guards, clamps, or scuff guards, including any associated with a vapor recovery system. Lessee's Maintenance obligations under this provision requires Lessee to immediately replace any hanging hardware that causes the fueling system to fail regulatory compliance testing. Check daily for visible leaks.

**J. Air Compressor**

Repair or replace, as necessary, all components of air compressors for service bay, car wash bay/building or remote air stand including all add-on equipment such as filters, air dryers, separators, regulators, above ground piping, excluding total compressor replacement.

**K. C-Store/Food Mart and Related Equipment (if located on Premises)**

1. Repair or replace, as necessary, all components of cooler/freezer and refrigeration units (walk-in and free-standing), excluding total system replacement. Provide preventive maintenance as required, but at least annually.

2. Repair or replace, as necessary[,] all food accessories, including, but not limited to coffee makers, juice and soda dispensers, ice dispensers, microwaves, gondolas and all other C-store/food mart related equipment, including lamps, ballasts, fuses and glass therein.

3. Keep all food handling equipment and food preparation areas clean, sanitary and in compliance with applicable Laws.

4. Keep all equipment drain lines clean and clear.

**L. Car Wash (if located on Premises)**

1. Repair or replace, as necessary, all elements of car wash equipment, including any optional or add-on equipment with control and connection hardware, including, but not limited to, brushes, dryers, wheel scrubbers, undercarriage washers, foamers, conveyors, entrance keypads, consoles, cash/coin/token acceptors, and all elements of any water reclaim system. Perform preventive maintenance per manufacturer[']s recommendations.

2. Repair or replace, as necessary, all elements of overhead doors or curtains and their controls including, but not limited to, motors, sensors, electric eyes, tracks, pneumatic actuators, pneumatic cylinders, chains, springs, and door edge sensors.

3. Car wash heating system (refer to Heating/Air Conditioning section).

4. Car wash air compressor (refer to Air Compressor section).

5. Car wash water reclaim tanks (refer to Plumbing section).

**M. Fire Protection**

1. Repair or replace, as necessary, dry chemical or liquid fire suppression/fire sprinkler equipment for fueling area and building including, but not limited to, sensors, bottles, heads, fuseable alarm/monitoring systems, cables, backflow preventers, above ground wiring, piping, and conduit. Replace and recharge system as necessary.

2. Furnish and maintain portable fire extinguishers.

3. Pay for and have performed period testing and inspection of fire suppression/fire sprinkler systems, and hand held extinguishers as required by regulating authority.

**N. Other Equipment**

1. Repair or replace, as necessary, all Lessee-owned equipment.

2. Repair or replace, as necessary, all elements of oil and lube equipment and used oil pumps, including, but not limited to, hoses, fittings, spouts, meters, pumps, above ground piping, and overhead reels.

3. Repair or replace, as necessary, all elements of interior and exterior video monitoring systems including

those required by regulating authorities such as self-serve dispenser monitoring. Maintenance responsibility includes, but is not limited to, cameras, monitors, recorders, switching devices, cables, wires, and above ground conduit. Pay for and have performed periodic testing and inspection as required by any regulating authority.

4. Repair or replace, as necessary, above ground and below ground safes.

5. Repair or replace, as necessary, pass through drawers.

**O. Miscellaneous**

1. Repair or replace, as necessary, all building locks and keys, latches for both interior and exterior doors and, in addition, door closers and hinges for interior doors.

2. Repair or replace, as necessary, all elements of overhead doors, excluding total door replacement.

3. Reset circuit breakers, replace electrical fuses.

4. Keep restrooms at all times neat, clean, safe and orderly, free of offensive odors and well stocked with proper supplies and cleaning materials.

5. Take all necessary pest control measures.

6. Repair or replace, as necessary, all bay and C-store/food mart cabinets and shelving including, but not limited to, doors, hinges, knobs, levers, cup dispensers, and condiment racks.

7. Maintain all paths of travel on the Premises free of obstruction and accessible in compliance with applicable accessibility law including but not limited to accessibility provisions of the Americans with Disabilities Act.

All repairs and replacements performed by the Lessee must meet or exceed the specifications of the existing

equipment (e.g. a 5-horsepower air compressor must be replaced with a 5-horsepower air compressor), of equal quality, as well as comply with Lessor's image standards, if applicable. If Lessee is unsure about a specific standard, Lessee should consult with Lessor.

MOTIVA
ENTERPRISES LLC

[Defendants' Exhibit 1166]

**Retailer #:** 524190
**Cost Center #:** 137850

## RETAIL FACILITY LEASE

THIS LEASE is effective January 1, 2004 ("Effective Date") between Motiva Enterprises LLC ("Lessor") whose address is 12700 Northborough Drive, Houston, TX 77067, and AKMAL INC ("Lessee") whose address is 302 WEST BROADWAY, SOUTH BOSTON, MA 02127.

This Lease is comprised of two parts. PART I sets forth the variable provisions of this Lease and references the applicable articles in PART II that sets forth the general provisions. To the extent there is a conflict between PART I and PART II, the provisions in PART I are controlling.

### PART I

**Article No.**

1(e) Leased Premises are located at 302 WEST BROADWAY, SOUTH BOSTON, MA 02127.

3 This Lease begins on the Effective Date specified above and expires December 31, 2006 ("Expiration Date").

4 Rent: Lessee shall pay Lessor the following monthly base rentals, PLUS THE DOUBLE NET EXPENSES WHICH MAY BE ADJUSTED AT THE END OF EACH 12-MONTH PERIOD AS DESCRIBED IN THIS ARTICLE AND IDENTIFIED ON EXHIBIT A:

| | |
|---|---|
| Months 1 – 12: | $10,540.00 |
| Months 13 – 24: | $10,793.00 |

Months 25 – 36: $11,074.00

20 Notice – Underlying lease. The Premises are subject to an underlying lease(s) that will expire on N/A, provided, however, the underlying lease may expire earlier upon N/A days notice by Lessor to its landlord(s).

23(b) Key Management Person designated for Lessee if Lessee is a Business Entity or Joint Lessee Akmal G. Moawed.

NOTE TO LESSEE: BE SURE TO READ AND UNDERSTAND ALL OF THE PROVISIONS OF PART I AND PART II OF THIS LEASE BEFORE YOU SIGN BELOW.

Executed on the date shown below.

| | |
|---|---|
| | Shell Oil Products US<br>On behalf of |
| AKMAL INC<br>Retailer | Motiva Enterprises LLC<br>Seller |
| By: /s/ A.G. Moawed | By: /s/ Allen Girndt<br>Allen Girndt |
| Title: President, Akmal Inc. | Title: Manager Contracts |
| Date: 12-18-03 | Date: 1/5/04 |

[Defendants' Exhibit 1175]

MOTIVA
ENTERPRISES LLC
Shell, Texaco & Saudi Aramco Working Together

**Retailer #:** 556418
**Cost Center #:** 137870

## RETAIL FACILITY LEASE

THIS LEASE is entered into between Motiva Enterprises LLC ("Lessor") whose address is 12700 Northborough Drive, Houston, TX 77067, and J & M AVRAMIDIS ("Lessee") whose address is 920 MAIN STREET, WALPOLE, MA 02081 and is effective on the later of the first day of the month following execution of this Lease by Lessee or the day after the original expiration date printed in Lessee's current lease with Lessor prior to any extensions thereof ("Effective Date").

This Lease is comprised of two parts. PART I sets forth the variable provisions of this Lease and references the applicable articles in PART II that sets forth the general provisions. To the extent there is a conflict between PART I and PART II, the provisions in PART I are controlling.

### PART I

**Article No.**

1(e) Leased Premises are located at: 920 MAIN STREET, WALPOLE, MA 02081.

3 This Lease begins on the Effective Date specified above and expires 3 years after the Effective Date on March 31, 2005 ("Expiration Date"). Lessee authorizes Lessor to insert in this Lease the date certain for the Expiration Date pursuant to the definition of Effective Date above.

4 Rent: Lessee shall pay Lessor the following monthly base rentals, PLUS THE DOUBLE NET EXPENSES WHICH MAY BE ADJUSTED AT THE END OF EACH 12-MONTH PERIOD AS DESCRIBED IN THIS ARTICLE AND IDENTIFIED ON EXHIBIT A:

| | |
|---|---|
| Months 1 – 12: | $3,567.00 |
| Months 13 – 24: | $3,567.00 |
| Months 25 – 36: | $3,567.00 |

20 Notice – Underlying lease(s): The Premises are subject to an underlying lease(s) that will expire on N/A; provided, however, the underlying lease(s) may expire earlier upon N/A days notice by Lessor to its landlord(s).

23(b) Key Management Person designated for Lessee if Lessee is a Business Entity or Joint Lessee: Jordanis Avramidis.

NOTE TO LESSEE: BE SURE TO READ AND UNDERSTAND ALL OF THE PROVISIONS OF PART I AND PART II OF THIS LEASE BEFORE YOU SIGN BELOW.

Executed on the date shown below.

| | |
|---|---|
| | Equiva Services LLC<br>On Behalf Of |
| J & M AVRAMIDIS<br>Retailer | Motiva Enterprises LLC<br>Seller |
| By: /s/ Jordanis Avramidis | By: /s/ Linda Paul<br>Linda Paul |
| Title: President | Title: Supervisor Contracts |
| Date: 1-7-2002 | Date: 1-29-02 |

[Defendants' Exhibit 1188]

MOTIVA
ENTERPRISES LLC
Shell, Texaco & Saudi Aramco Working Together

**Retailer #:** 552824
**Cost Center #:** 137700

## RETAIL FACILITY LEASE

THIS LEASE is entered into between Motiva Enterprises LLC ("Lessor") whose address is 12700 Northborough Drive, Houston, TX 77067, and CYNTHIA KAROL ("Lessee") whose address is 182 PLEASANT ST. ATTLEBORO, MA 02703 and is effective on the later of the first day of the month following execution of this Lease by Lessee or the day after the original expiration date printed in Lessee's current lease with Lessor prior to any extensions thereof ("Effective Date").

This Lease is comprised of two parts. PART I sets forth the variable provisions of this Lease and references the applicable articles in PART II that sets forth the general provisions. To the extent there is a conflict between PART I and PART II, the provisions in PART I are controlling.

## PART I

**Article No.**

1(e) Leased Premises are located at: 182 PLEASANT ST, ATTLEBORO, MA 02703.

3 This Lease begins on the Effective Date specified above and expires 3 years after the Effective Date on 1/31/04 ("Expiration Date"). Lessee authorizes Lessor to insert in this Lease the date certain for the Expiration Date pursuant to the definition of Effective Date above.

4 Rent: Lessee shall pay Lessor the following monthly base rentals, PLUS AN AMOUNT ADJUSTED AT THE END OF EACH 12-MONTH PERIOD AS DESCRIBED IN THIS ARTICLE AND IDENTIFIED ON EXHIBIT A:

| | |
|---|---|
| Months 1 – 12: | $3,650.00 |
| Months 13 – 24: | $3,852.00 |
| Months 25 – 36: | $4,055.00 |

21 Notice – Underlying lease(s): The Premises are subject to an underlying lease(s) that will expire on N/A; provided, however, the underlying lease(s) may expire earlier upon N/A days notice by Lessor to its landlord(s).

24(b) Key Management Person designated for Lessee if Lessee is a Business Entity or Joint Lessee: _____.

NOTE TO LESSEE: BE SURE TO READ AND UNDERSTAND ALL OF THE PROVISIONS OF PART I AND PART II OF THIS LEASE BEFORE YOU SIGN BELOW.

Executed on the date shown below.

| | |
|---|---|
| | Equiva Services LLC<br>On Behalf Of |
| CYNTHIA KAROL<br>Retailer | Motiva Enterprises LLC<br>Seller |
| By: /s/ Cynthia Karol | By: /s/ Linda Paul<br>Linda Paul |
| Title: Dealer | Title: Supervisor Contracts |
| Date: 12/21/00 | Date: 1-16-01 |

[Defendants' Exhibit 1218]

MOTIVA
ENTERPRISES LLC
Shell, Texaco & Saudi Aramco Working Together

**Retailer #:** 540204
**Cost Center #:** 137855

## RETAIL FACILITY LEASE

THIS LEASE is entered into between Motiva Enterprises LLC ("Lessor") whose address is 12700 Northborough Drive, Houston, TX 77067, and MACS SHELL SERVICE INC ("Lessee") whose address is 123 EAST MAIN STREET, WEBSTER, MA 01570 and is effective on the later of the first day of the month following execution of this Lease by Lessee or the day after the original expiration date printed in Lessee's current lease with Lessor prior to any extensions thereof ("Effective Date").

This Lease is comprised of two parts. PART I sets forth the variable provisions of this Lease and references the applicable articles in PART II that sets forth the general provisions. To the extent there is a conflict between PART I and PART II, the provisions in PART I are controlling.

## PART I

**Article No.**

1(e) Leased Premises are located at: 135 EAST MAIN ST, SOUTHBRIDGE, MA 01550.

3 This Lease begins on the Effective Date specified above and expires 3 years after the Effective Date on October 31, 2004 ("Expiration Date"). Lessee authorizes Lessor to insert in this Lease the date certain for the Expiration Date pursuant to the definition of Effective Date above.

4 Rent: Lessee shall pay Lessor the following monthly base rentals, PLUS AN AMOUNT ADJUSTED AT THE END OF EACH 12-MONTH PERIOD AS DESCRIBED IN THIS ARTICLE AND IDENTIFIED ON EXHIBIT A:

| | |
|---|---|
| Months 1 – 12: | $3,411.00 |
| Months 13 – 24: | $3,601.00 |
| Months 25 – 36: | $3,790.00 |

21 Notice – Underlying lease(s): The Premises are subject to an underlying lease(s) that will expire on 10/31/02; provided, however, the underlying lease(s) may expire earlier upon 90 days notice by Lessor to its landlord(s).

24(b) Key Management Person designated for Lessee if Lessee is a Business Entity or Joint Lessee: Francis A. Marcoux .

NOTE TO LESSEE: BE SURE TO READ AND UNDERSTAND ALL OF THE PROVISIONS OF PART I AND PART II OF THIS LEASE BEFORE YOU SIGN BELOW.

Executed on the date shown below.

| | |
|---|---|
| | Equiva Services LLC |
| MACS SHELL | On Behalf Of |
| SERVICE, INC | Motiva Enterprises LLC |
| Retailer | Seller |
| By: /s/ Francis A. Marcoux | By: /s/ Linda Paul |
| | Linda Paul |
| Title: President | Title: Supervisor Contracts |
| Date: 10/23/01 | Date: 12-13-01 |

Signed under protest or if not acceptable
under protest then I sign without protest.

FAM

Linda – Legal Approved

[Defendants' Exhibit 1220]

MOTIVA
ENTERPRISES LLC
Shell Texaco & Saudi Aramco Working Together

**Retailer #:** 519634
**Cost Center #:** 137880

## RETAIL FACILITY LEASE

THIS LEASE is entered into between Motiva Enterprises LLC ("Lessor") whose address is 12700 Northborough Drive, Houston, TX 77067, and MACS SHELL SERVICE INC ("Lessee") whose address is 123 EAST MAIN STREET, WEBSTER, MA 01570 and is effective on the later of the first day of the month following execution of this Lease by Lessee or the day after the original expiration date printed in Lessee's current lease with Lessor prior to any extensions thereof ("Effective Date").

This Lease is comprised of two parts. PART I sets forth the variable provisions of this Lease and references the applicable articles in PART II that sets forth the general provisions. To the extent there is a conflict between PART I and PART II, the provisions in PART I are controlling.

## PART I

**Article No.**

1(e) Leased Premises are located at: 123 EAST MAIN ST, WEBSTER, MA 01570.

3 This Lease begins on the Effective Date specified above and expires 3 years after the Effective Date on _____ ("Expiration Date"). Lessee authorizes Lessor to insert in this Lease the date certain for the Expiration Date pursuant to the definition of Effective Date above.

4 Rent: Lessee shall pay Lessor the following monthly base rentals, PLUS AN AMOUNT ADJUSTED AT THE END OF EACH 12-MONTH PERIOD AS DESCRIBED IN THIS ARTICLE AND IDENTIFIED ON EXHIBIT A:

| | |
|---|---|
| Months 1 – 12: | $5,226.00 |
| Months 13 – 24: | $5,517.00 |
| Months 25 – 36: | $5,807.00 |

21 Notice – Underlying lease(s): The Premises are subject to an underlying lease(s) that will expire on 2/28/02; provided, however, the underlying lease(s) may expire earlier upon 90 days notice by Lessor to its landlord(s).

24(b) Key Management Person designated for Lessee if Lessee is a Business Entity or Joint Lessee: Francis A. Marcoux .

NOTE TO LESSEE: BE SURE TO READ AND UNDERSTAND ALL OF THE PROVISIONS OF PART I AND PART II OF THIS LEASE BEFORE YOU SIGN BELOW.

Executed on the date shown below.

| | |
|---|---|
| | Equiva Services LLC |
| MACS SHELL SERVICE INC | On Behalf Of |
| | Motiva Enterprises LLC |
| Retailer | Seller |
| By: /s/ Francis A. Marcoux | By: _____ |
| | Linda Paul |
| Title: President | Title: Supervisor Contracts |
| Date: 10/23/01 | Date: _____ |

Signed under protest or if not acceptable
under protest then I sign without protest.

FAM

[Defendants' Exhibit 1265]

MOTIVA
ENTERPRISES LLC
Shell, Texaco & Saudi Aramco Working Together

**Retailer #:** 510727
**Cost Center #:** 137854

## RETAIL FACILITY LEASE

THIS LEASE is entered into between Motiva Enterprises LLC ("Lessor") whose address is 12700 Northborough Drive, Houston, TX 77067, and RAM CORPORATION INC ("Lessee") whose address is 904 MAIN STREET, SOUTHBRIDGE, MA 01550 and is effective on the later of the first day of the month following execution of this Lease by Lessee or the day after the original expiration date printed in Lessee's current lease with Lessor prior to any extensions thereof ("Effective Date").

This Lease is comprised of two parts. PART I sets forth the variable provisions of this Lease and references the applicable articles in PART II that sets forth the general provisions. To the extent there is a conflict between PART I and PART II, the provisions in PART I are controlling.

## PART I

**Article No.**

1(e) Leased Premises are located at: 904 MAIN ST, SOUTHBRIDGE, MA 01550.

3 This Lease begins on the Effective Date specified above and expires 3 years after the Effective Date on May 31, 2004 ("Expiration Date"). Lessee authorizes Lessor to insert in this Lease the date certain for the Expiration Date pursuant to the definition of Effective Date above.

4 Rent: Lessee shall pay Lessor the following monthly base rentals, PLUS AN AMOUNT ADJUSTED AT THE END OF EACH 12-MONTH PERIOD AS DESCRIBED IN THIS ARTICLE AND IDENTIFIED ON EXHIBIT A:

| | |
|---|---|
| Months 1 – 12: | $5,899.00 |
| Months 13 – 24: | $6,209.00 |
| Months 25 – 36: | $6,209.00 |

21 Notice – Underlying lease(s): The Premises are subject to an underlying lease(s) that will expire on N/A; provided, however, the underlying lease(s) may expire earlier upon N/A days notice by Lessor to its landlord(s).

24(b) Key Management Person designated for Lessee if Lessee is a Business Entity or Joint Lessee: _____.

NOTE TO LESSEE: BE SURE TO READ AND UNDERSTAND ALL OF THE PROVISIONS OF PART I AND PART II OF THIS LEASE BEFORE YOU SIGN BELOW.

Executed on the date shown below.

| | |
|---|---|
| | Equiva Services LLC |
| RAM CORPORATION | On Behalf Of |
| INC | Motiva Enterprises LLC |
| Retailer | Seller |
| By: /s/ Richard Melanson | By: /s/ Linda Paul |
| | Linda Paul |
| Title: President | Title: Supervisor Contracts |
| Date: 5/10/01 | Date: 6-5-01 |

[Defendant's Exhibit 1293]

MOTIVA
ENTERPRISES LLC
Shell, Texaco & Saudi Aramco Working Together

**Retailer #:** 503658
**Cost Center #:** 139656

## RETAIL FACILITY LEASE

THIS LEASE is entered into between Motiva Enterprises LLC ("Lessor") whose address is 12700 Northborough Drive, Houston, TX 77067, and JOHN A SULLIVAN ("Lessee") whose address is 141 FRONT STREET, SCITUATE, MA 02066 and is effective on the later of the first day of the month following execution of this Lease by Lessee or the day after the original expiration date printed in Lessee's current lease with Lessor prior to any extensions thereof ("Effective Date").

This Lease is comprised of two parts. PART I sets forth the variable provisions of this Lease and references the applicable articles in PART II that sets forth the general provisions. To the extent there is a conflict between PART I and PART II, the provisions in PART I are controlling.

## PART I

**Article No.**

1(e) Leased Premises are located at: 141 FRONT ST, SCITUATE, MA 02066.

3 This Lease begins on the Effective Date specified above and expires 3 years after the Effective Date on May 31, 2003 ("Expiration Date"). Lessee authorizes Lessor to insert in this Lease the date certain for the Expiration Date pursuant to the definition of Effective Date above.

4 Rent: Lessee shall pay Lessor the following monthly base rentals, plus an amount adjusted at the end of each 12-month period as described in this article:

| | |
|---|---|
| Months 1 – 12: | $4,089.00 |
| Months 13 – 24: | $4,329.00 |
| Months 25 – 36: | $4,570.00 |

21 Notice – Underlying lease(s): The Premises are subject to an underlying lease(s) that will expire on N/A; provided, however, the underlying lease(s) may expire earlier upon N/A days notice by Lessor to its landlord(s).

24(b) Key Management Person designated for Lessee if Lessee is a Business Entity or Joint Lessee: _____.

NOTE TO LESSEE: BE SURE TO READ AND UNDERSTAND ALL OF THE PROVISIONS OF PART I AND PART II OF THIS LEASE BEFORE YOU SIGN BELOW.

Executed on the date shown below.

| | |
|---|---|
| | Equiva Services LLC<br>On Behalf Of |
| JOHN A SULLIVAN<br>Retailer | Motiva Enterprises LLC<br>Seller |
| By: /s/ John Sullivan | By: /s/ Linda Paul<br>Linda Paul |
| Title: Retailer | Title: Supervisor Contracts |
| Date: 5/3/00 | Date: 5-17-00 |

[Defendants' Exhibit 1232]

MOTIVA
ENTERPRISES LLC
Shell, Texaco & Saudi Aramco Working Together

June 1, 1999

STEPHEN J PISARCZYK II
114 W BOYLSTON ST
WEST BOYLSTON, MA 01583

Re: Shell Motor Fuel Station
Lease/Dealer Agreement
WIC: 22086700303

Dear Shell Branded Retailer:

Please refer to the Motor Fuel Station Lease ("Lease") referenced above between you and Motiva Enterprises LLC ("Motiva") covering the station described above ("Premises") and Dealer Agreement between you and Motiva covering the sale and delivery by Motiva of Shell branded products to you at said Premises (collectively, the "Agreements"). As you may already be aware, we intend to roll-out and implement a new rent program very soon. This effort includes new lease documents and a new facility rent calculation methodology. In order to minimize confusion and provide continuity, in the interim, all leases currently expiring will be extended as described below under the current terms until the new program is ready for implementation.

Please be advised that this letter will serve as our agreement to extend the effective date of expiration of the Agreements from the expiration date contained in the Agreements through the earliest of the execution of a new Lease and Dealer Agreement, the effective date of a notice of non-renewal, or December 31, 1999, subject, of

course, to our agreement that such extension shall be without prejudice to our respective legal positions as they would have existed had the effective date of expiration not been extended. Further, nothing herein shall be construed as a representation or commitment that the Agreements (a) will not be terminated prior to the end of the extension period or (b) will be renewed at the end of the term.

Your agreement to this extension shall be presumed unless you expressly provide us written notice to the contrary.

Very truly yours,

Equiva Services LLC
On Behalf Of
Motiva Enterprises LLC

/s/ Linda Paul

Linda Paul
Supervisor Contracts

cc: Sales Consultant
File

**[Defendants' Exhibit 1235]**

**MOTIVA**
ENTERPRISES LLC
Shell, Texaco & Saudi Aramco Working Together

Retailer #:514603
Cost Center#: 137883
Station Location: 114 W BOYLSTON ST
WEST BOYLSTON, MA 01583
Shell Location

February 29, 2000

Stephen J Pisarczy[k]
114 W Boylston St
West Boylston, MA 01583

Re: Month-To-Month Holdover

Dear Retailer:

Please refer to Dealer Agreement and Motor Fuels Agreement ("Agreements") between you and Motiva Enterprises LLC ("Motiva") covering the station described above ("Premises").

Please be advised that this letter will serve as our agreement to extend the effective date of expiration of the Agreements on a Month-To-Month basis or the earliest of the execution of a new Retail Facility Lease and Retail Sales Agreements, or the effective date of a notice of non-renewal, subject, of course, to our agreement that such extension shall be without prejudice to our respective legal positions as they would have existed had the effective date of expiration not been extended. Further, nothing herein shall be construed as a representation or commitment that the Agreements (a) will not be terminated prior to the end of the extension period or (b) will be renewed at the end of the term.

Your agreement to this extension shall be presumed unless you expressly provide us written notice to the contrary.

Very truly yours,

Equiva Services LLC
On Behalf Of
Motiva Enterprises LLC

/s/ Linda Paul

Linda Paul
Supervisor Contracts

cc: Resnick
File

**MOTIVA**
ENTERPRISES LLC
Shell, Texaco & Saudi Aramco Working Together

**[Defendants' Exhibit 1236]**

Attn: Contracts
12700 Northborough Drive, MS 1012
Houston, Texas 77067

Retailer #:514603
Cost Center#: 137883
Station Location: 114 W BOYLSTON ST
WEST BOYLSTON, MA 1583
Shell Location

June 22, 2000

STEPHEN J PISARCZYK JR II
114 W BOYLSTON ST
WEST BOYLSTON, MA 01583-0000

Re: Term Extension

Dear Retailer:

Please refer to agreements between you and Motiva Enterprises LLC ("Company") covering the station described above ("Premises").

Please be advised that this letter will serve as our agreement to extend the effective date of expiration of the agreements from the expiration date contained in any franchise agreement or any extension letter you may have received through the earliest of the (a) effective date of a fully executed renewal lease and sales agreements, (b) the effective date of any non-renewal or termination, or (c) [ ] December 31, 2000, subject, of course, to our agreement that such extension, if any, shall be without prejudice to our respective legal positions as they would have existed had the effective date of expiration

not been extended. Further, nothing herein shall be construed as a representation or commitment that the agreements (a) will not be terminated prior to the end of any extended term or (b) will be renewed at the end of the any extended term.

Your agreement to this extension shall be presumed unless you expressly provide us written notice to the contrary.

Sincerely,

Equiva Services LLC
On Behalf Of
Motiva Enterprises LLC

/s/ Linda Paul

Linda Paul
Supervisor Contracts

cc: RESNIK, ROBERT R
File

**[Defendants' Exhibit 1055]**

Shell Oil Products Company [Shell logo]
400 Blue Hill Drive
Westwood, MA 02090

New England Retail District

Telephone: (617) 461-4600
Fax: (617) 461-4640

Station Location 141 FRONT ST
SCITUATE, MA 2066
Dealer WIC #22067830210

November 30, 1995

JOHN A SULLIVAN
141 FRONT ST
SCITUATE, MA 2066

Re: OFFER OF VARIABLE RENT PROGRAM

Dear Shell Dealer:

This letter confirms the continuation beyond December 31, 1995 of Shell's voluntary variable rent program ("Program") under which you may reduce your operating cost at the above station ("Station"). Shell has been pleased with the broad participation in the Program by its dealers and expects to be able to offer the Program to its dealers through December 31, 1996 and beyond. While the Program remains in effect, Shell will annually review the rate of rent reduction which may be earned, the monthly threshold volumes and the minimum occupancy rent and advise you of any adjustments for the next 12-month period of the Program (Jan-Dec) or until the Program terminates in accordance with its terms.

While the Program is in effect, you may earn a reduction in the following month's rent if you elect to purchase

and receive delivery from Shell at the Station of any gallons of automotive gasoline in excess of the quantity specified below for any month:

| AUTOMOTIVE GASOLINE – QUANTITY (IN THOUSANDS OF GALLONS) | | | | | | |
|---|---|---|---|---|---|---|
| 1996 | JAN | FEB | MAR | APR | MAY | JUN |
| | 7 | 0 | 0 | 0 | 0 | 0 |
| | JUL | AUG | SEP | OCT | NOV | DEC |
| | 0 | 0 | 0 | 0 | 0 | 0 |

Volume changes in the above are the result of scheduled rent changes.

Such reduction will be calculated at the rate of 4.50 cents for each gallon of automotive gasoline purchased and received by you from Shell at the Station during the relevant month in excess of the above quantity, and such amount will be applied to reduce the rent otherwise payable under your lease for such month, but not below a minimum rent of $398. If you do not purchase the quantity of gasoline specified above during a given month, no reduction will be earned and the rent specified in your lease will be payable for the following month.

As a reminder, significant volume attainment is a goal of the Variable Rent Program. The VRP is designed to provide you a volume incentive through the reduction of fixed costs. The program features are designed to encourage you to establish and achieve individual growth goals without adverse impact in subsequent program years.

Any reduction earned by you pursuant to the Program will be applied as follows:

> On approximately the fifth working day following the end of each month that the Program is in effect,

Shell will compute any rent reduction earned during the prior month and credit your subsequent month's rent account for such amount. If you participate in Shell's Bank Draft or Electronic Settlement Program, Shell will draw a draft on or electronically debit your bank account for the difference between your rent payable under your lease and the reduction earned. If no reduction is earned, Shell will draft or debit the full rent payable under your lease. If you do not participate in Shell's Bank Draft or Electronic Settlement Program, you may calculate your reduction earned during each month and deduct such amount from your subsequent month's rent payable and pay Shell the net amount. Differences in your calculation of reduction due and actual reduction earned must be handled promptly. If deliberate or repeated miscalculations occur, they may be considered as a failure by you to pay rent in a timely manner and a violation of your lease. An accounting of all transactions will appear on your monthly Rent and Collection Notice.

With specific regard to the Station and your lease relating thereto, the Program will continue until the earlier of the expiration of your lease, or December 31, 1996, but Shell may, at its option, upon at least 30 days' prior notice to you, given by telephone or regular mail, either (a) discontinue the Program at the end of any month or (b) modify or amend the Program at the beginning of any month.

Upon any renewal of your lease prior to January 1, 1997, Shell may at its option, reoffer the Program to you, with or without modification.

In addition to the foregoing, the Program will terminate upon notice given by Shell to you by telephone or

regular mail in the event that any mandatory or voluntary price or allocation program is implemented by either Shell or a governmental agency.

If you should engage in any improper activity for the purpose of earning for yourself or another Shell dealer a more favorable reduction under this Program than would normally be due at any one or more stations leased by Shell to you, or such other Shell dealer, such improper conduct will be considered by Shell as a ground to disqualify you from further participation in the Program, without prejudice to any other rights available to Shell by reason of such conduct.

The Program is being unilaterally offered by Shell, and your decision to participate is entirely voluntary. Since the Program does not constitute an amendment to your lease, it does not require any acceptance or commitment on your part.

If you elect not to participate in the Program or if the Program should terminate for any reason, as indicated above, the rent provided in your lease will apply in accordance with its terms without any offsetting reduction. It should further be understood that the Program in no way affects Shell's normal practices concerning determination of rent, including the rent specified in any future renewal of your lease.

At your request, your Shell representative will discuss the Program in more detail with you and answer any questions you may have.

Very truly yours,

/s/ Lee J. Fry

District Manager

[Plaintiffs' Exhibit 800]

**CINDY KAROL**
**Rents Paid**

| YEAR | ACTUAL TOTAL ANNUAL RENT PAID | |
|---|---|---|
| 1995 | $20,723 | 2/95 takeover lease |
| 1996 | $29,963 | 2/96 1st lease |
| 1997 | $34,401 | |
| 1998 | $43,206 | |
| 1999 | $59,447 | |
| 2000 | $99,120 | ← STIP ENDED |
| 2001 | $66,371 | 2/01 2nd lease |
| 2002 | $68,602 | |
| 2003 | $71,384 | |

**John Sullivan**

| Net Rent Under VRP | Net Rent Under 1998-1999 STIP | Net Rent Per New Lease | Net Rent After Reappraisal |
|---|---|---|---|
| $2,800 – $3,000 Per month | $3,500 – $4,000 Per month | $10,800 Per month | $5,627 – $6,172 Per month |

**[Plaintiffs' Exhibit 802]**

[Plaintiffs' Exhibit 803]

**AKMAL, INC.**
**RENTS PAID**

| YEAR | ACTUAL TOTAL ANNUAL RENT PAID | |
|---|---|---|
| 1994 | $31,721 | |
| 1995 | $37,365 | |
| 1996 | $41,391 | |
| 1997 | $38,089 | |
| 1998 | $33,928 | |
| 1999 | $44,323 | |
| 2000 | $95,170 | (STIP ENDED) |
| 2001 | $96,165 | |
| 2002 | $114,792 | |
| 2003 | $115,524 | |
| 2004 | $107,504<br>RENT (through 8/04)<br>$161,256<br>(ANNUALIZED RENT) | |

[Plaintiffs' Exhibit 804]

**MAC'S SHELL SERVICE, INC.**
**SOUTHBRIDGE, MASSACHUSETTS LOCATION**

**RENTS PAID**

| YEAR | ACTUAL TOTAL ANNUAL RENT PAID |
|---|---|
| 1995 | $14,521 |
| 1996 | $5,253 |
| 1997 | $6,390 |
| 1998 | $27,118 |
| 1999 | $61,784 |
| 2000 | (STIP ends) $64,893 |
| 2001 | $63,580 |
| 2002 | $56,600 |
| 2003 | $59,240 |
| 2004 | $46,080 (9 months only) $62,224 (Annualized Rent) |

[Plaintiffs' Exhibit 805]

# MAC'S SHELL SERVICE, INC.
## WEBSTER, MASSACHUSETTS LOCATION
## RENTS PAID

| YEAR | ACTUAL TOTAL ANNUAL RENT PAID |
|---|---|
| 1996 | $43,723 |
| 1997 | $35,093 |
| 1998 | $56,352 |
| 1999 | $100,003 |
| 2000 | **STIP ends**<br>$103,636 |
| 2001 | $96,482 |
| 2002 | $75,088 |
| 2003 | $79,826 |
| 2004 | $62,952<br>(9 months only)<br>$86,238<br>(Annualized Rent) |

[Defendants' Exhibit 1510]

## FRAN MARCOUX – WEBSTER
## SEPTEMBER 1998 – DECEMBER 1999
## TRANSITIONAL REBATES

### 1998

| | Contract Rent | VRP Credit | | Net |
|---|---|---|---|---|
| January | $7,663.00 | (4,495.50) | | $3,167.50 |
| February | $7,663.00 | (4,188.42) | | $3,474.58 |
| March | $7,663.00 | (3,774.69) | | $3,888.31 |
| April | $7,663.00 | (4,296.78) | | $3,366.22 |
| May | $7,663.00 | (4,123.35) | | $3,539.65 |
| June | $7,663.00 | (4,657.01) | | $3,005.99 |
| July | $7,663.00 | (4,358.61) | | $3,304.39 |
| August | $7,663.00 | (4,772.75) | | $2,890.25 |
| **TOTALS** | $61,304.00 | (34,667.11) | 57% | $26,636.89 |
| | | **STIP Credit** | | |
| September | $7,663.00 | (4,214.65) | | $3,448.35 |
| October | $7,663.00 | (3,831.50) | | $3,831.50 |
| November | $7,663.00 | (4,214.65) | | $3,448.35 |
| December | $7,663.00 | (4,214.65) | | $3,448.35 |
| **TOTALS** | $30,652.00 | ($16,475.45) | 53% | $14,176.55 |

Source: Marcoux 1776-78, 1782, 1786; MACS 277-99; MOMA 1776, 1778, 1782, 1786; Marcoux Exhibit 22

**1999**

| | Contract Rent | STIP Credit | | Net |
|---|---|---|---|---|
| January | $7,663.00 | (3,831.50) | | $3,831.50 |
| February | $7,663.00 | (5,364.10) | | $2,298.90 |
| March | $8,046.00 | (4,827.60) | | $3,218.40 |
| April | $8,046.00 | (4,023.00) | | $4,023.00 |
| May | $8,046.00 | (4,320.00) | | $3,726.00 |
| June | $8,046.00 | (1,921.20) | | $6,124.80 |
| July | $8,046.00 | (2,035.30) | | $6,010.70 |
| August | $8,046.00 | (3,240.21) | | $4,805.79 |
| September | $8,046.00 | (3,250.41) | | $4,795.59 |
| October | $8,046.00 | (4,322.00) | | $3,724.00 |
| November | $8,046.00 | (3,165.18) | | $4,880.82 |
| December | $8,046.00 | (4,165.44) | | $3,880.56 |
| **TOTALS** | $95,786.00 | ($44,465.94) | 46% | $51,320.06 |

Source: Marcoux 1960-61, 1963-65, 1968-70, 1978, 1981, 1986, 1990-91, 1993, 1996, 1999, 2002, 2004, 2008-10, 2012-13; MACS 307-329; Marcoux Exhibit 22

[Plaintiffs' Exhibit 812]

**RAM CORP., INC.**

**RENTS PAID**

| YEAR | ACTUAL TOTAL ANNUAL RENT PAID | EXHIBIT |
|---|---|---|
| 1996 | $27,926 | MELANSON 1102-1106 |
| 1997 | $38,324 | MELANSON 1102-1106 |
| 1998 | $42,098 | MELANSON 1102-1106 |
| 1999 | $69,734 | MELANSON 1102-1106 |
| 2000 | $92,713 | MELANSON 1102-1106 |
| 2001 | $69,057 (out of business in 10/01) Annualized Rent – $91,296 | MELANSON 1102-1106 |

[Plaintiffs' Exhibit 815]

**SID PRASHAD**
**RENTS PAID**

| YEAR | ACTUAL TOTAL ANNUAL RENT PAID | EXHIBIT |
|---|---|---|
| 1995 | $51,480 | PRASHAD 233-249 |
| 1996 | $38,460 | PRASACCT 72-82 |
| 1997 | $48,480 | PRASACCT 58-71 |
| 1998 | $35,316 | PRASHAD 141 |
| 1999 | $47,594 (entered into first Motiva lease 8/1/99) | PRASHAD 138 |
| 2000 | $73,000 | PRASHAD 136 |
| 2001 | $76,380 | PRASHAD 702 |
| 2002 | $77,725 | PRASHAD 704-745 |
| 2003 | $81,613 | PRASHAD 704-745 |
| 2004 | $84,615 (Annualized Rent) | PRASHAD 704-745 |

[Plaintiffs' Exhibit 817]

**J&M AVRAMIDIS, INC.**
**RENTS PAID**

| YEAR | ACTUAL TOTAL ANNUAL RENT PAID | EXHIBIT |
|---|---|---|
| 1994 | $18,503 | AVRAMIDIS 383 |
| 1995 | $16,005 | AVRAMIDIS 382 |
| 1996 | $6,604 | AVRAMIDIS 381 |
| 1997 | $11,023 | AVRAMIDIS 380 |
| 1998 | $30,741 | AVRAMIDIS 379 |
| 1999 | $47,772 | AVRAMIDIS 378 |
| 2000 | $55,701 | AVRAMIDIS 377 |
| 2001 | $61,248 | AVRAMIDIS 441 |
| 2002 | $61,550 | AVRAMIDIS 440 |
| 2003 | $62,796 | AVRAMIDIS 1659 |

[Plaintiffs' Exhibit 823]

**STEPHEN PISARCZYK**
**114 W. BOYLSTON LOCATION**
**RENTS PAID**

| YEAR | ACTUAL TOTAL ANNUAL RENT PAID | EXHIBIT |
|---|---|---|
| 1994 | $23,850 | PISARCZYK 666 |
| 1995 | $27,908 | PISARCZYK 1739 |
| 1996 | $22,291 | PISARCZYK 664 |
| 1997 | $34,041 | PISARCZYK 618 |
| 1998 | $24,913 | PISARCZYK 672 |
| 1999 | $43,768 | PISARCZYK 670 |
| 2000 | $33,801 (7 months only – out of business in 7/00) | PISARCZYK 2993 |

[Defendants' Exhibit 1508]

## AKMAL, INC.

## SUMMARY FINANCIAL INFORMATION

| Year | Total Sales | Gross Profit | Officer's Salary | Rent | Net Income |
|---|---|---|---|---|---|
| 1994 | $1,767,129 | $263,957 | $13,000 | $31,721 | $38,785 |
| 1995 | $2,003,448 | $293,983 | $13,000 | $37,365 | $31,435 |
| 1996 | $1,705,105 | $253,524 | $13,000 | $41,391 | $29,406 |
| 1997 | $1,665,543 | $205,364 | $13,250 | $38,089 | $21,333 |
| 1998 | $1,438,878 | $205,915 | $23,250 | $33,928 | $5,798 |
| 1999 | $1,813,972 | $232,689 | $26,000 | $44,323 | $18,212 |
| 2000 | $2,125,968 | $327,611 | $24,000 | $95,170 | $52,491 |
| 2001 | $2,077,904 | $353,305 | $24,000 | $96,165 | $97,836 |
| 2002 | $1,907,064 | $362,021 | $25,500 | $114,792 | $88,870 |
| 2003 | $2,187,921 | $327,635 | $25,500 | $115,524 | $43,767 |

Source: Exhibits 1000; P-803

[Defendants' Exhibit 1516]

# MAC'S SHELL SERVICE, INC.
# SUMMARY FINANCIAL INFORMATION
## DEALER INCOME

| YEAR | FRANCIS MARCOUX COMPENSATION | NET INCOME | FRANCIS MARCOUX COMPENSATION + NET INCOME |
|---|---|---|---|
| 1994 | $114,500 | $25,034 | $139,534 |
| 1995 | $112,680 | ($6,733) | $105,947 |
| 1996 | $146,500 | $52,691 | $199,191 |
| 1997 | $138,000 | $19,884 | $157,884 |
| 1998 | $148,000 | $69,063 | $217,063 |
| 1999 | $164,360 | ($6,153) | $158,207 |
| 2000 | $153,837 | $125,362 | $279,199 |
| 2001 | $103,000 | $103,387 | $206,387 |
| 2002 | $115,655 | $37,133 | $152,788 |
| 2003 | $157,307 | $54,884 | $212,191 |
| 2004 (annualized) | $78,000 | $115,100 | $193,100 |
| Sum: 2000-2004 | $607,799 | $435,866 | $1,043,665 |

SOURCES: MARCOUX 3762, MARCOUX 3773; Exhibit 1093

[Defendants' Exhibit 1518]

**R.A.M. CORPORATION**
**SUMMARY FINANCIAL INFORMATION**

**NET INCOME**

| YEAR | NET INCOME |
|---|---|
| 1994 | $87,104 |
| 1995 | $70,561 |
| 1996 | $65,599 |
| 1997 | $429 |
| 1998 | $21,970 |
| 1999 | $28,022 |
| 2000 | $56,989 |
| 2001 | $188,372 |

SOURCE: Exhibit 1093

## SCHEDULE 3E

## MAC'S SHELL SERVICE, INC. (MARCOUX)

### Analysis of Profitability Compared to Industry

| Year Ended 12/31: | 2003 | 2002 | 2001 | 2000 | 1999 | 1998 | 1997 | 1996 | 1995 | 1994 |
|---|---|---|---|---|---|---|---|---|---|---|
| Revenue | 8,069,633 | 7,571,550 | 7,840,069 | 8,378,822 | 7,305,040 | 6,486,486 | 6,914,039 | 7,138,720 | 6,227,852 | 6,142,369 |
| Net Income (pre-tax) | 54,884 | 37,133 | 103,387 | 125,362 | (6,153) | 69,063 | 19,884 | 52,691 | (6,733) | 25,034 |
| Plus: Owner's Compensation | 157,307 | 115,655 | 103,000 | 153,837 | 164,360 | 148,000 | 138,000 | 146,500 | 112,680 | 114,500 |
| Profit Before Owner's Compensation | 212,191 | 152,788 | 206,387 | 279,199 | 158,207 | 217,063 | 157,884 | 199,191 | 105,947 | 139,534 |
| As % of Revenue | 2.6% | 2.0% | 2.6% | 3.3% | 2.2% | 3.3% | 2.3% | 2.8% | 1.7% | 2.3% |
| Industry Profit % (A) | N/A | N/A | 1.3% | 2.2% | 2.7% | 2.6% | 3.2% | 3.4% | 3.7% | 3.4% |

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**[DEFENDANTS' EXHIBIT 1537]**

## SCHEDULE 1E

## AKMAL, INC.

## Analysis of Profitability Compared to Industry

| Year Ended 12/31: | 2003 | 2002 | 2001 | 2000 | 1999 | 1998 | 1997 | 1996 | 1995 | 1994 |
|---|---|---|---|---|---|---|---|---|---|---|
| Revenue | 2,187,921 | 1,907,064 | 2,077,904 | 2,125,968 | 1,813,972 | 1,438,878 | 1,665,543 | 1,705,105 | 2,003,448 | 1,767,129 |
| Net Income (pre-tax) | 43,767 | 88,870 | 97,836 | 52,491 | 18,212 | 5,798 | 21,333 | 29,406 | 31,435 | 38,785 |
| Plus: Owner's Compensation | 25,500 | 25,500 | 24,000 | 24,000 | 26,000 | 23,250 | 13,250 | 13,000 | 13,000 | 13,000 |
| Profit Before Owner's Compensation | 69,267 | 114,370 | 121,836 | 76,491 | 44,212 | 29,048 | 34,583 | 42,406 | 44,435 | 51,785 |
| As % of Revenue | 3.2% | 6.0% | 5.9% | 3.6% | 2.4% | 2.0% | 2.1% | 2.5% | 2.2% | 2.9% |
| Industry Profit % (A) | N/A | N/A | 1.3% | 2.2% | 2.7% | 2.6% | 3.2% | 3.4% | 3.7% | 3.4% |

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**[DEFENDANTS' EXHIBIT 1540]**

## SCHEDULE 2D

## PLEASANT ST. SHELL (Karol)

## Analysis of Profitability Compared to Industry

| Year Ended 12/31: | 2003 | 2002 | 2001 | 2000 | 1999 | 1998 | 1997 | 1996 | 1995 | 1994 |
|---|---|---|---|---|---|---|---|---|---|---|
| Revenue | 2,091,199 | 2,008,137 | 1,972,161 | 2,308,549 | 1,968,646 | 1,643,467 | 1,817,861 | 1,888,661 | 1,669,455 | 1,763,383 |
| Net Income (pre-tax) | 28,822 | 22,952 | 38,568 | 8,388 | 39,683 | 25,130 | 28,832 | 25,710 | 30,446 | 60,112 |
| Plus: Owner's Compensation (A) | | | | | | | | | | |
| Profit Before Owner's Compensation | 28,822 | 22,952 | 38,568 | 8,388 | 39,683 | 25,130 | 28,832 | 25,710 | 30,446 | 60,112 |
| As % of Revenue | 1.4% | 1.1% | 2.0% | 0.4% | 2.0% | 1.5% | 1.6% | 1.4% | 1.8% | 3.4% |
| Industry Profit % (B) | N/A | N/A | 1.3% | 2.2% | 2.7% | 2.6% | 3.2% | 3.4% | 3.7% | 3.4% |

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**[DEFENDANTS' EXHIBIT 1543]**

## SCHEDULE 5E

## J&M AVRAMIDIS INC.

### Analysis of Profitability Compared to Industry

| Year Ended 12/31: | 2003 | 2002 | 2001 | 2000 | 1999 | 1998 | 1997 | 1996 | 1995 | 1994 |
|---|---|---|---|---|---|---|---|---|---|---|
| Revenue | 697,272 | 788,737 | 879,612 | 546,252 | 748,563 | 886,295 | 1,142,644 | 1,249,578 | 1,093,630 | 1,067,730 |
| Net Income (pre-tax) | (50,081) | (16,917) | (36,590) | (7,123) | (8,192) | (22,120) | (28,351) | (2,714) | (19,895) | (13,861) |
| Plus: Owner's Compensation | 62,400 | 62,400 | 62,400 | 63,600 | 62,400 | 62,400 | 62,400 | 62,400 | 62,400 | 55,400 |
| Profit Before Owner's Compensation | 12,319 | 45,483 | 25,810 | 56,477 | 54,208 | 40,280 | 34,049 | 59,686 | 42,505 | 41,539 |
| As % of Revenue | 1.8% | 5.8% | 2.9% | 10.3% | 7.2% | 4.5% | 3.0% | 4.8% | 3.9% | 3.9% |
| Industry Profit % (A) | N/A | N/A | 1.3% | 2.2% | 2.7% | 2.6% | 3.2% | 3.4% | 3.7% | 3.4% |

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**[DEFENDANTS' EXHIBIT 1546]**

## SCHEDULE 8D

## HARBORSIDE SHELL (Sullivan)

## Analysis of Profitability Compared to Industry

| Year Ended 12/31: | 2000 | 1999 | 1998 | 1997 | 1996 | 1995 | 1994 |
|---|---|---|---|---|---|---|---|
| Revenue | 1,731,645 | 1,970,007 | 1,826,975 | 2,187,861 | 2,174,177 | 2,097,551 | 1,998,997 |
| Net Income (pre-tax) | 2,434 | (17,626) | 27,218 | 41,450 | 23,223 | 47,256 | 46,237 |
| Plus: Owner's Compensation (A) | ——— | ——— | ——— | ——— | ——— | ——— | ——— |
| Profit Before Owner's Compensation | 2,434 | (17,626) | 27,218 | 41,450 | 23,223 | 47,256 | 46,237 |
| As % of Revenue | 0.1% | -0.9% | 1.5% | 1.9% | 1.1% | 2.3% | 2.3% |
| Industry Profit % (B) | 2.2% | 2.7% | 2.6% | 3.2% | 3.4% | 3.7% | 3.4% |

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**[DEFENDANTS' EXHIBIT 1555]**

## SCHEDULE 4E

## R.A.M. CORPORATION (Melanson)

## Analysis of Profitability Compared to Industry

| Year Ended 12/31: | 2001 | 2000 | 1999 | 1998 | 1997 | 1996 | 1995 | 1994 |
|---|---|---|---|---|---|---|---|---|
| Revenue | 2,027,442 | 2,663,050 | 2,483,494 | 2,283,983 | 2,445,328 | 2,301,840 | 2,049,291 | 1,910,764 |
| Net Income (pre-tax) | 24,175 | 56,989 | 28,022 | 21,970 | 429 | 65,599 | 70,561 | 87,104 |
| Plus: Owner's Compensation | 17,900 | 22,800 | 22,800 | 22,800 | 22,800 | 21,982 | 22,800 | 22,800 |
| Profit Before Owner's Compensation | 42,075 | 79,789 | 50,822 | 44,770 | 23,229 | 87,581 | 93,361 | 109,904 |
| As % of Revenue | 2.1% | 3.0% | 2.0% | 2.0% | 0.9% | 3.8% | 4.6% | 5.8% |
| Industry Profit % (A) | 1.3% | 2.2% | 2.7% | 2.6% | 3.2% | 3.4% | 3.7% | 3.4% |

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**[DEFENDANTS' EXHIBIT 1558]**

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MASSACHUSETTS**

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| *IN RE* Shell Oil Products Co. Dealer Franchise Litigation | MDL Docket No. 1461<br>United States District Court for the District of Massachusetts Civil Action No. 01-CV-11300 RWZ<br>United States District Court for the District of New Hampshire Civil Action No. 01-CV-430<br>United States District Court for the District of Rhode Island Civil Action No. 01-CV-514T |

**DEFENDANTS' MOTION FOR JURY INSTRUCTIONS**

Defendants, Shell Oil Company, Shell Oil Products Company LLC (f/k/a Shell Oil Products Company), and Motiva Enterprises, LLC request that the jury be instructed as to the claims that have been presented in this case according to the proposed instructions attached hereto.

Dated: December 3, 2004

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(4) PMPA Claims

The relationship between Plaintiffs, as franchised gasoline service station dealers on the one hand, and Defendants, as franchisors on the other, is governed in part by a federal statue called the Petroleum Marketing Practices Act ("PMPA"). In particular, the PMPA governs when and how the franchise relationship between Defendants and Plaintiffs may be terminated or nonrenewed.

The statute contained a general prohibition against the termination or nonrenewal of a franchise relationship except under certain circumstances.[11] A franchise relationship consists of three statutory components: (1) the contract to use Shell's trademark; (2) the contract for the supply of motor fuel; and (3) the lease of the premises.[12]

**PMPA Claims for Constructive Termination of Final Shell Leases**

Plaintiffs claim that by terminating the rent subsidy program as of January 1, 2000, and thereafter changing the actual rent set forth in the Final Shell Leases, Defendants have terminated Plaintiffs' franchises in violation of the Petroleum Marketing Practices Act, also known as the "PMPA."

Because Plaintiffs in this case renewed their franchise agreements and continued to operate their franchised Shell branded gasoline service stations under the new retail facility leases containing program rent after Defendants terminated the VRP and eliminated the subsequent rent subsidy program as of January 1, 2000, Plaintiffs are not claiming that their franchises were actually terminated. Instead, Plaintiffs are alleging that Defendants' conduct resulted in a "constructive termination" of their franchises in violation of the PMPA.

A "constructive termination" in the context of the PMPA has been defined as an assignment that *either* (A) terminates one of the three statutory components of the franchise agreement or (B) violates state assignment law.[13] There has been no claim in this case that when

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[11] 15 U.S.C. §§ 2802(a), (b).

[12] 15 U.S.C. § 2801(1)(B).

[13] *Riverdale Enterprises Inc. v. Shell Oil Co.*, 41 F. Supp. 2d 56, 62 (D. Mass. 1999); *see, also, Chestnut Hill Gulf, Inc. v. Cumberland*

Shell transferred its assets to Motiva in July, 1998, it violated any state assignment law. Plaintiffs are claiming that the termination of the rent subsidy program and requirement that Plaintiffs pay the rent set forth in their Final Shell Leases breached those contracts in violation of the PMPA.

In order to prove a constructive termination under the PMPA, each plaintiff must establish by a preponderance of the evidence that his or her Final Shell Lease was terminated.

**PMPA Claim for "Constructive Nonrenewal" of New Motiva Leases**

Plaintiffs further allege that Defendants' conduct in charging rent under the new rent formula and making other changes under the new Motiva Retail Facility Leases was for the purpose of converting Plaintiffs' stations into company operated locations or preventing their renewal in violation of the PMPA.

A constructive nonrenewal occurs when a franchisor and franchisee fail to agree to changes or additions to provisions of the franchise agreements. You must first determine for each plaintiff whether that plaintiff and the defendants failed to agree to the new Motiva Lease. If you find that there was an agreement, then you must find for the defendants. If you find that there was no such agreement, then you must consider whether the franchisor's decision to make such changes or additions was

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*Farms, Inc.*, 940 F.2d 744, 750 (1st Cir. 1991) (noting that "There is nothing in the language of the [PMPA] stating or suggesting that a valid assignment of franchises as part of the sale of the assets of a refiner-distributor constitutes, without more, a termination or nonrenewal of the franchise relationships between the selling franchisor and its franchisees.")

made in good faith and in the normal course of business and was not for the purpose of either (1) converting the franchisee's leased premises to a company operated location or (2) otherwise preventing the renewal of the franchise relationship.[14]

If the defendants have proven by a preponderance of the evidence that their decision to move to a Retail Facility Lease that contains an asset-based rent was made in good faith and in the normal course of business and not for the purpose of converting that plaintiff's station to a company operated location or otherwise preventing the renewal of their franchise relationship, you must find for Defendants on the PMPA claims.

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[14] 15 U.S.C. § 2802(b)(3)(A).

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MASSACHUSETTS**

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| *IN RE* Shell Oil Products Co. Dealer Franchise Litigation | MDL Docket No. 1461<br>United States District Court for the District of Massachusetts Civil Action No. 01-CV-11300 RWZ<br>United States District Court for the District of New Hampshire Civil Action No. 01-CV-430<br>United States District Court for the District of Rhode Island Civil Action No. 01-CV-514T |

## DEFENDANTS' PROPOSED SUPPLEMENTAL AND AMENDED JURY INSTRUCTIONS

Defendants, Shell Oil Company, Shell Oil Products Company, LLC (f/k/a Shell Oil Products Company), and Motiva Enterprises LLC, offer the following proposed supplemental and amended jury instructions. In some instances, these jury instructions propose changes to instructions suggested by plaintiffs; in others, they propose additional jury instructions to conform to the evidence.

* * * * *

## NATURE OF CLAIMS AND DEFENSES

**(Revises Plaintiffs' Requested Instruction No. 10)**

* * * * *

Second, plaintiffs claim that defendants have violated a federal statute called the Petroleum Marketing Practices Act (PMPA). The PMPA says that a franchisor may not terminate a franchise relationship—which consists of three components: a lease, fuel supply agreement, and a

trademark—before the agreed expiration of its term. The statute says that if a franchisor (Shell) assigns its franchise contracts to another party (Motiva), Motiva is bound by these contracts the same as Shell was. If, as a result of the assignment, there was a material change in the parties' rights or obligations under the lease such that one of the elements of the franchise relationship is lost, then there might be, under the PMPA, what is called a "constructive termination." Plaintiffs claim that the termination of the rent subsidy programs constructively terminated the franchise agreements.

Defendants deny that there was any material change in the parties' rights or obligations under the lease as a result of the assignment to Motiva and, therefore, that there was no constructive termination. Defendants also argue that the termination of the subsidy programs was not prohibited under the lease agreement and, in any event, did not constructively terminate the franchise relationship because the PMPA excludes breach of contract claims such as plaintiffs' claims regarding the termination of the subsidy programs, when the franchisee has renewed his or her franchise agreements and there has been no termination or nonrenewal of the franchise relationship.

Third, plaintiffs claim another violation of the PMPA, a constructive nonrenewal. The statute imposes limits on a franchisor's ability not to renew a franchise arrangement even after the expiration of the agreement. Plaintiffs say that Motiva's leases during the 2000-2004 time period contained rent and other provisions designed to prevent plaintiffs from renewing their leases and to allow Motiva to convert the stations to company owned ones. Defendants deny that the new leases contained any improper rent or other provisions, and further argue that

the PMPA requires that a dealer challenge any new proposed lease when it is offered and that, by signing it, the dealer has agreed to the new terms.

* * * * *

[Dated: December 6, 2004]

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MASSACHUSETTS**

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Civil Action No. 01-11300-RWZ

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FRANCIS MARCOUX, et al.,
*Plaintiffs,*

vs.

SHELL OIL PRODUCTS CO. LLC, et al.,
*Defendants.*

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TRANSCRIPT OF CHARGE CONFERENCE
December 6, 2004

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* * * * *

[4] MR. SANSON: Your Honor, with respect to constructive termination, I think a case that the plaintiffs have repeatedly cited and it is a First Circuit case is Chestnut Hill and I was looking at it and I, if I can, I'd like to read—

THE COURT: I have it.

MR. SANSON: —two sentences from it. I'm reading at—I have a printout page, it's Section II, Roman II. I don't know what version you have. It's at page 18 of one reporter, 751 of another.

THE COURT: Which part of Roman II?

MR. SANSON: It's starting with the fifth paragraph [5] under Roman II, which starts, "A two-part test has been used."

THE COURT: Yeah.

MR. SANSON: "To determine whether the assignment of a franchise results in its constructive termination, thereby implicating the act. To sustain a claim under the PMPA that a franchisor assigned and thereby constructively terminated a franchise agreement, the franchisee must prove either, one, that by making the assignment the franchisor breached one of the three statutory components of the franchise agreement, the contract to use the refiner's trademark, the contract for the supply of motor fuel, or the lease of the premises and thus violated the PMPA; or two, that the franchisor made the assignment in violation of state law and thus the PMPA was invoked."

I don't believe there's any claim that the assignment was in violation of state law.

THE COURT: Sure. The breach of contract.

MR. SANSON: That the assignment, that the assignment breached state law, assigning it to Motiva somehow breached state law?

THE COURT: I can't believe this is correct because that's not what the statute says.

MR. SANSON: I believe it is, your Honor. This is the First Circuit.

THE COURT: Let me pass that for the moment.

[6] MR. SANSON: Well, I think this is what—I think this is—if there's a place in the statute, I have a copy of the statute with me, I believe this is exactly what the issue here is, that they have not alleged a violation of state law; they have alleged that by making [the] assignment, there was a breach. And as the case law makes clear, the breach has to relate to one of the three statutory components of the franchise relationship. So that that's the relevant inquiry for this claim.

THE COURT: Well, what does Section 2802 mean when it says that "except as otherwise provided no franchisor may terminate any franchise prior to the conclusion of the term"?

MR. SANSON: Correct. And there was no termination prior to the term.

THE COURT: But that's what they're saying, there was a constructive termination by breaching the terms of the agreement, of the lease agreement, which is one of the franchise agreements.

MR. SANSON: Correct. And what the PMPA makes clear is if what the franchisee is alleging is that the franchisor breached the agreement, that is a breach of contract claim[;] that is not a PMPA claim, that is not an actual termination, that is not a constructive termination. The termination under the PMPA goes to the termination of the relationship, the franchise relationship. It doesn't cover [7] anything else. It's a creation of Congress regarding that relationship between a franchisor and a franchisee under the Petroleum Marketing Practices Act. And that relationship has three components to it.

THE COURT: Any one of which terminated would amount to a termination of the franchise.

MR. SANSON: Exactly. Absolutely.

THE COURT: Now, what the plaintiffs' position is is that the breach of the amended lease was a termination, could be deemed to amount to a termination of the lease agreement.

MR. SANSON: And if it were a lease or a—well, they're claiming that it was a termination of the lease agreement or a breach of the lease agreement.

THE COURT: A breach that could be deemed to be a termination under the PMPA. That's as I understand the plaintiffs' position.

Can I just go forward and tell [you what] I propose to tell the jury because this is one of the things that I do address. Now maybe I'm wrong about it, but I think it would be best if I just go through the charge and then have you comment on it.

Let me just tell you at the outset that there is no chance, I think there's a zero chance that I will tell the jury anything in precise legal words that either of you asked me to [8] give. I have to do it in my own words, otherwise I can't explain it to the jury. So don't expect to hear what you gave me, although I very much—I acknowledge what you gave me and I thank you because it is helpful for me to find my own words for it, but that's what I did.

* * * * *

[48] MR. SANSON: * * * Number five talks about constructive termination. We were discussing that earlier, and I had been quoting from the Chestnut Hill case and I believe your Honor was referring to the PMPA 2802(b).

THE COURT: I mean, I think there is a slight difference between a mere breach and whether that breach amounts to a constructive termination, and that's for the jury to decide. That's how I put it to them.

MR. SANSON: The—it seems that the issue of the assignment—as I understand the case law that constructive termination comes into play in an assignment context, if the assignment itself is the event that gives rise to a loss of—

THE COURT: That's not the allegation here.

MR. SANSON: Correct. And that's why we believe they have not stated a claim for constructive termination.

THE COURT: Well, I mean, you and I disagree about that, and you and the plaintiffs disagree about it. I happen to think the plaintiffs more correctly state the law on this and so you certainly, if you lose on this, can appeal it. I do believe that if there is a lease amendment and if there was the breach of the lease as amended, then there may be a constructive termination; but the jury has to decide whether it amounts to that. It may not. Even the way I phrase it, you may not end up having—losing on this.

[49] MR. SANSON: And the standard for determining whether or not the breach is of such a magnitude to cause a constructive termination is, I believe, whether the changes were so onerous as to cause problems.

THE COURT: Something like that. What do you want me to say?

MR. SANSON: That had the—

THE COURT: At one point I think I said make life miserable for them. You didn't like that either.

MR. SANSON: Correct. And later it's discourage, which I don't like either.

THE COURT: Well, I mean, it's got to be something in there that causes grief. It's not a constructive termination if it doesn't. And I think merely the breach alone is not. It's got to be the breach that causes some difficulties. And I'll—

MR. SANSON: I think that's right.

THE COURT: Well, tell me what you want me to say if you don't like what I did say.

MR. SANSON: Well, again what I think [it] requires is loss of one of the three elements within the context—

THE COURT: Well, but if you say that, then the breach of the lease agreement would in and of itself be a constructive termination because it—the breach—

MR. SANSON: It's breach. It's a breach of a [50] contract. And that's fully addressable by any plaintiff in any PMPA relationship, that if the franchisor ever breaches any term, they have an immediate cause of action. It's not under the PMPA, it's for breach of contract. And if it's a horrendous breach, they have a very strong—

THE COURT: If there was a problem with it, since we also have the breach of contract here, we can ignore whatever the jury says about this. It doesn't affect the validity of the verdict in the end. I think it's okay as it is; but if the Court of Appeals says it isn't, it throws out the jury's answer as to this and leaves in the breach of contract. It's a harmless error, if it's error, I think.

MR. SANSON: Our view is by including it and presenting it as another, the jury might say well, we'll give them this and not this. There's a lot of things that can go on with multiple claims that shouldn't be presented. I understand what you're saying in terms of the damages are the same and so there shouldn't be double damages, but by presenting two claims, we believe that's prejudicial.

In terms of trying to—and I think the exact problem the Court is commenting on about, well, how onerous or how substantial does it have to be is precisely why constructive termination requires loss of one of the three elements, to avoid exactly that dilemma[ as] to where to draw some fuzzy line. It's a very clear line. If you lose one of the [51] three elements, you've got a constructive termination. If you don't, you don't.

So I think that we object to this instruction—or verdict form. I think it reduces the problem to the extent the Court makes it clear or suggests that it has to be so onerous as to be the equivalent of a termination or to deny the franchisee the value or benefit of the franchise relationship. I think it's on something of that nature that—

THE COURT: I'll think about that.

MR. SANSON: —that might be appropriate.

* * * * *

MR. SANSON: Okay. Claim C on the bottom of page 6 is the constructive nonrenewal. We believe that the case law is very clear that there isn't such a thing as constructive nonrenewal. There can be or at least arguably there could be a constructive termination in that you've got an ongoing relationship and there's been an assignment, which has removed one of the elements and, therefore, there's been a termination in the middle of it.

A nonrenewal is necessarily an event that occurs at the time of the offering of a new lease, new franchise agreement. And the way the PMPA is set up is it establishes a process so that there is certainty between the parties as to [52] whether there's an agreement or not. The PMPA requires a franchisor to offer renewal paper to a franchisee more than 90 days prior to the expiration of the old paper. The franchisee then has the opportunity to review that and determine do they agree or not. And if they don't, that's why they have the 90-day period to consider that and then bring an action under the PMPA complaining about the nonrenewal.

So the PMPA requires the franchisor, puts an extra burden on them, to say here's your new renewal paper 120 days ahead of time, do you accept it or not? Then it

puts the burden on the franchisee to say, all right, here's my new paper, do I like it or not? If I like it, I sign it and then we have an agreement, which then goes on and could be breached and so forth. But at least we know the agreement. If I don't like it, then I don't accept it and I can challenge it, and now we know we don't have an agreement. So you either have a renewal or you don't.

So constructive nonrenewal I think is almost a contradiction in terms because of the structure of the PMPA that it, unlike any other contract, it sets out these time periods, it provides for a franchisee to come into court and to seek an injunction, preventing the new terms from going into effect until there's been a resolution of these new terms. And so that's what plaintiffs had the right to do under the PMPA.

And, again, we've mentioned this before but the [53] Dersch Energies case[ ] and subsequent circuit cases since then have uniformly held that that's the process. You either sign or you don't. You can't have it both ways. The one case they cite, circuit case, Pro Sales, was prior to Dersch, was, in our view, inconsistent and rejected by Dersch, said, well, okay, you don't have to sign it, or you can sign it under protest if you promptly take action to challenge it. And that certainly wasn't done here.

So as I understand their claim for constructive nonrenewal, it's that the new paper was—they get to sign it and operate under it and also challenge it. And we believe under those facts there hasn't been a constructive or any kind of a nonrenewal.

THE COURT: Okay. You included a request on constructive nonrenewal, which is substantially what I gave, but I understand that you object to the idea all together.

MR. SANSON: Yes, I want to make that clear for the record.

THE COURT: That's fine.

MR. SANSON: And that we don't believe that exists certainly under these facts.

THE COURT: Okay.

* * * * * *

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MASSACHUSETTS**

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Civil Action No. 01-11300-RWZ

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FRANCIS MARCOUX, et al.,
*Plaintiffs,*

vs.

SHELL OIL PRODUCTS CO. LLC, et al.,
*Defendants.*

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TRANSCRIPT OF JURY TRIAL
DAY FOURTEEN
December 7, 2004

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[98] [THE COURT (instructing the jury):] The PMPA, the Petroleum Marketing Practices Act, is a federal statute designed to protect franchisees, and it provides that franchisors may terminate franchise relationships—and we're talking in not just the lease, but the constellations of agreements that constitute the franchise. Franchisors may terminate the franchise relationship or fail to renew it only in accordance with the [99] statute. Specifically, the franchisor may terminate only if a franchisee does not carry out its obligations, or if some event occurs that reasonably requires the end of the franchise relationship, or if the parties agree in writing to end the relationship and follow the procedures in the statute.

If a franchisor, Shell—well, in this case Shell—assigns a franchise to another—in this case Motiva—then the lat-

ter is bound by the statute and the agreements and may not take any action to terminate the contract or to make material changes in the contract that are so [ ] onerous that it causes problems for the franchisee. That is, whether it's Shell we're talking about or the successor of Shell, Motiva, they're both bound by the statutes, bound by the agreements.

Now, if a franchisor makes a change[ ] that may be regarded as equivalent [to] termination, what we call a constructive termination, then the franchisor is in violation of the statute. I note that the franchise arrangement consists of three pieces, the lease agreement, the sale of product agreement, the gas, and the permission to use the franchise—the trademark. That constitutes the franchise, those three things.

Now, if the leases were amended to include the subsidy and then the subsidy was ended before the expiration of the lease, the ending of the subsidy may amount to constructive [100] termination. You will have to decide whether that change was such a material change that it effectively ended the lease, even though the plaintiffs continue to operate the business. Now, the evidence as to this question is the same that you consider under Claim A, but the question is slightly different. It's not simply was the lease breached, but did that breach amount to a constructive termination. Was it effectively the end of the franchise relationship?

Nonetheless, you should consider this question only as to those plaintiffs you found had their leases amended. If somebody didn't have their lease amended, then we don't need to consider it. If you determine the lease wasn't breached, there wasn't a constructive termination of the lease either.

So you need to decide whether the plaintiff has proven that the lease was amended, that there was a breach of the lease, and that that breach was so egregious as to amount to a termination of the franchise relationship.

Now, question six calls for the same answer as [ ] does three. Note that the plaintiff will only collect once if you found damages in response to both, but it just seemed to me neater and cleaner to have the damages question separately. But it's the same elements of damages and the same response as question three.

* * * * *

[101] Claim C is the nonrenewal part of the case under the federal statute, the PMPA. And this claim is similar legally to Claim B. The statute also specifically describes the conditions under which a franchisor may refuse to renew a franchise. Mostly, again, having to do with the dereliction of any franchisee. You know, franchisee never pays bills, doesn't keep the station going, doesn't do a good job, then it may be that the franchisor may decide to terminate the franchise.

The statute does allow a franchisor to amend a franchise agreement and to add to them but only if the changes are not designed in bad faith to bring about the conversion of the franchise operated stations to company-operated ones. So a franchisor may amend but not—but not for the purpose of undoing the franchise arrangement and causing the franchisees to sell so that they can then have company stores.

Now, here again, even though the franchisor says it wants to renew, if the proposed terms violate the statute, that may be deemed to be a constructive nonrenewal. Even if the plaintiffs signed the agreement and continued to operate the business, the terms may amount to a con-

structive nonrenewal. The question for you is were the rent increases and other new provisions in the Motiva leases designed to discourage the plaintiffs from renewing and to enable Motiva to [102] convert the stations—to convert the stations to company-owned ones?

Consider all the evidence concerning each plaintiff's situation[ ], the market conditions, the economic forces, the consolidations of two companies and whatever problems may have come from that, and then determine whether under all the circumstances the new leases were constructively nonrenewed, even though they were handed to the franchisees. If you find that the plaintiff proved a constructive nonrenewal, then the answer to question eight is yes and you go to nine and ten. If you find the plaintiff did not so prove, the answer to question eight is no.

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**UNITED STATES DISTRICT COURT**
**DISTRICT OF MASSACHUSETTS**

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|---|---|
| *IN RE* SHELL OIL PRODUCTS CO. DEALER FRANCHISEES LITIGATION | MDL Docket No. 1461<br>United States District Court for the District of Massachusetts Civil Action No. 01-CV-11300<br>United States District Court for the District of New Hampshire Civil Action No. 01-CV-430<br>United States District Court for the District of Rhode Island Civil Action No. 01-CV-514T |

## SPECIAL VERDICT

**Claim A. Breach of Lease Agreements by Elimination of the Rent Subsidy Program**

1. Did each plaintiff and Shell orally and by their course of conduct amend the written leases to provide for the calculation of rent in accordance with a rent subsidy program?

| | YES | NO |
|---|---|---|
| **Cynthia Karol** (S. Attleboro, MA) | ✓ | ___ |
| **John Sullivan** (Scituate, MA) | ✓ | ___ |
| **Akmal, Inc.** (Akmal Moawed) (South Boston, MA) | ✓ | ___ |
| **Sid Prashad** (Worcester, MA) | ✓ | ___ |

| | | |
|---|---|---|
| **Mac's Shell Service (#1)**<br>(Francis Marcoux)<br>(Southbridge, MA) | ✓ | ___ |
| **Mac's Shell Service (#2)**<br>(Francis Marcoux)<br>(Webster, MA) | ✓ | ___ |
| **RAM Corp.**<br>(Richard Melanson)<br>(Southbridge, MA) | ✓ | ___ |
| **J&M Avramidis, Inc.**<br>(Jordan Avramidis)<br>(Walpole, MA) | ✓ | ___ |
| **Stephen Pisarczyk**<br>(West Boylston, MA) | ✓ | ___ |

If the answer is YES as to any plaintiff, please answer Questions 2 and 3 as to that plaintiff. If the answer is NO as to any plaintiff, please go directly to Question 8 as to that plaintiff.

2. Did defendants' elimination of the rent subsidy program (VRP and STIP) breach the leases between Shell and the following plaintiffs?

| | YES | NO |
|---|---|---|
| **Cynthia Karol**<br>(S. Attleboro, MA) | ✓ | ___ |
| **John Sullivan**<br>(Scituate, MA) | ✓ | ___ |
| **Akmal, Inc.**<br>(Akmal Moawed)<br>(South Boston, MA) | ✓ | ___ |
| **Sid Prashad**<br>(Worcester, MA) | ✓ | ___ |

| | | |
|---|---|---|
| **Mac's Shell Service (#1)**<br>(Francis Marcoux)<br>(Southbridge, MA) | ✓ | ___ |
| **Mac's Shell Service (#2)**<br>(Francis Marcoux)<br>(Webster, MA) | ✓ | ___ |
| **RAM Corp.**<br>(Richard Melanson)<br>(Southbridge, MA) | ✓ | ___ |
| **J&M Avramidis, Inc.**<br>(Jordan Avramidis)<br>(Walpole, MA) | ✓ | ___ |
| **Stephen Pisarczyk**<br>(West Boylston, MA) | ✓ | ___ |

If you answered YES to both Questions 1 and 2 as to any plaintiff, please answer next Question 3 as to that plaintiff. If you did not answer YES to both Questions 1 and 2 as to any plaintiff, you need not answer Questions 3 and 4 as to that plaintiff.

3. The damages of any plaintiff as to whom you answered YES to both Questions 1 and 2 consist of two elements.

a. The amount of any STIP subsidy not paid to that plaintiff from the date of the termination of the STIP to the date on which that plaintiff's lease expired.

b. The diminution of the value of that plaintiff's business as a result of the termination of the STIP.

These damages are as follows:

| | |
|---|---|
| **Cynthia Karol**<br>(S. Attleboro, MA) | $119,547. |
| **John Sullivan**<br>(Scituate, MA) | $123,271. |

| | |
|---|---|
| **Akmal, Inc.**<br>(Akmal Moawed)<br>(South Boston, MA) | $217,771. |
| **Sid Prashad**<br>(Worcester, MA) | $102,838. |
| **Mac's Shell Service (#1)**<br>(Francis Marcoux)<br>(Southbridge, MA) | $158,564. |
| **Mac's Shell Service (#2)**<br>(Francis Marcoux)<br>(Webster, MA) | $186,582. |
| **RAM Corp.**<br>(Richard Melanson)<br>(Southbridge, MA) | $106,011. |
| **J&M Avramidis, Inc.**<br>(Jordan Avramidis)<br>(Walpole, MA) | $155,706. |
| **Stephen Pisarczyk**<br>(West Boylston, MA) | $116,548. |

4. Should plaintiffs recover interest on the damages you found from the date of the termination of the STIP (December 31, 1999) until today?

**YES** ✓ **NO** ___

Please answer next Question 5 as to those plaintiffs for whom you answered YES to Questions 1 and 2. As to all others, go directly to Question 8.

**Claim B. Violation of Petroleum Marketing Practices Act (PMPA) by Constructive Termination of Franchise**

5. Did defendants' elimination of the rent subsidy program constitute a constructive termination of the franchises under PMPA of the following plaintiffs?

| | YES | NO |
|---|---|---|
| **Cynthia Karol**<br>(S. Attleboro, MA) | ✓ | ___ |
| **John Sullivan**<br>(Scituate, MA) | ✓ | ___ |
| **Akmal, Inc.**<br>(Akmal Moawed)<br>(South Boston, MA) | ✓ | ___ |
| **Sid Prashad**<br>(Worcester, MA) | ✓ | ___ |
| **Mac's Shell Service (#1)**<br>(Francis Marcoux)<br>(Southbridge, MA) | ✓ | ___ |
| **Mac's Shell Service (#2)**<br>(Francis Marcoux)<br>(Webster, MA) | ✓ | ___ |
| **RAM Corp.**<br>(Richard Melanson)<br>(Southbridge, MA) | ✓ | ___ |
| **J&M Avramidis, Inc.**<br>(Jordan Avramidis)<br>(Walpole, MA) | ✓ | ___ |
| **Stephen Pisarczyk**<br>(West Boylston, MA) | ✓ | ___ |

6. The damages for constructive termination of the franchise are the same damages as those for breach of the lease; namely, an amount equal to any subsidy not paid to a plaintiff from the date of termination of the STIP to the commencement of the Motiva lease plus any diminution in value of that plaintiff's business as a consequence of the termination of the STIP during that same period.

These damages are as follows:

| | |
|---|---|
| **Cynthia Karol**<br>(S. Attleboro, MA) | $119,547. |
| **John Sullivan**<br>(Scituate, MA) | $123,271. |
| **Akmal, Inc.**<br>(Akmal Moawed)<br>(South Boston, MA) | $217,771. |
| **Sid Prashad**<br>(Worcester, MA) | $102,838. |
| **Mac's Shell Service** (#1)<br>(Francis Marcoux)<br>(Southbridge, MA) | $158,564. |
| **Mac's Shell Service** (#2)<br>(Francis Marcoux)<br>(Webster, MA) | $186,582. |
| **RAM Corp.**<br>(Richard Melanson)<br>(Southbridge, MA) | $106,011. |
| **J&M Avramidis, Inc.**<br>(Jordan Avramidis)<br>(Walpole, MA) | $155,706. |
| **Stephen Pisarczyk**<br>(West Boylston, MA) | $116,548. |

7. Should plaintiffs recover interest on the damages you found from the date of the constructive termination of their franchise until today?

YES ✓ NO ___

Please answer next Question 8.

**Claim C. Violation of the PMPA by Constructive Non-Renewal of the Franchises**

8. Did the Motiva leases amount to constructive non-renewal of the following plaintiffs' leases?

| | YES | NO |
|---|---|---|
| **Cynthia Karol** (S. Attleboro, MA) | ✓ | ___ |
| **John Sullivan** (Scituate, MA) | ✓ | ___ |
| **Akmal, Inc.** (Akmal Moawed) (South Boston, MA) | ✓ | ___ |
| **Sid Prashad** (Worcester, MA) | ✓ | ___ |
| **Mac's Shell Service (#1)** (Francis Marcoux) (Southbridge, MA) | ✓ | ___ |
| **Mac's Shell Service (#2)** (Francis Marcoux) (Webster, MA) | ✓ | ___ |
| **RAM Corp.** (Richard Melanson) (Southbridge, MA) | ✓ | ___ |
| **J&M Avramidis, Inc.** (Jordan Avramidis) (Walpole, MA) | ✓ | ___ |
| **Stephen Pisarczyk** (West Boylston, MA) | ✓ | ___ |

If the answer as to any plaintiff is YES, as to that plaintiff please answer next Questions 9 and 10. If you

answered NO as to any plaintiff, please go directly to Question 11.

9. The damages for constructive non-renewal consist of two elements.

a. The amount of rent paid in excess of the industry standard.

b. The diminution of the value of plaintiff's business as a result of the excessive rent.

| | |
|---|---|
| **Cynthia Karol**<br>(S. Attleboro, MA) | $164,847. |
| **John Sullivan**<br>(Scituate, MA) | $105,460. |
| **Akmal, Inc.**<br>(Akmal Moawed)<br>(South Boston, MA) | $44,573. |
| **Sid Prashad**<br>(Worcester, MA) | $186,752. |
| **Mac's Shell Service (#1)**<br>(Francis Marcoux)<br>(Southbridge, MA) | $180,182. |
| **Mac's Shell Service (#2)**<br>(Francis Marcoux)<br>(Webster, MA) | $165,433. |
| **RAM Corp.**<br>(Richard Melanson)<br>(Southbridge, MA) | $53,644. |
| **J&M Avramidis, Inc.**<br>(Jordan Avramidis)<br>(Walpole, MA) | $168,510. |
| **Stephen Pisarczyk**<br>(West Boylston, MA) | $96,991. |

10. Should plaintiffs recover interest on these damages from the date the Motiva leases took effect until today?

**YES** ✓ **NO** ___

Please answer next Question 11.

**Claim D. Violation of the Massachusetts Uniform Commercial Code (UCC).**

11. Did defendants violate the UCC by setting the DTW (Dealer Tank Wagon) prices in bad faith by charging plaintiffs DTW prices that were not commercially reasonable?

| | YES | NO |
|---|---|---|
| **Cynthia Karol**<br>(S. Attleboro, MA) | ✓ | ___ |
| **John Sullivan**<br>(Scituate, MA) | ✓ | ___ |
| **Akmal, Inc.**<br>(Akmal Moawed)<br>(South Boston, MA) | ✓ | ___ |
| **Sid Prashad**<br>(Worcester, MA) | ✓ | ___ |
| **Mac's Shell Service (#1)**<br>(Francis Marcoux)<br>(Southbridge, MA) | ✓ | ___ |
| **Mac's Shell Service (#2)**<br>(Francis Marcoux)<br>(Webster, MA) | ✓ | ___ |
| **RAM Corp.**<br>(Richard Melanson)<br>(Southbridge, MA) | ✓ | ___ |

| | | |
|---|---|---|
| **J&M Avramidis, Inc.**<br>(Jordan Avramidis)<br>(Walpole, MA) | ✓ | ___ |
| **Stephen Pisarczyk**<br>(West Boylston, MA) | ✓ | ___ |

If the answer as to any plaintiff is YES, as to that plaintiff please answer next Question 12.

12. The damages for overcharging is the total amount of the excess over the commercially reasonable amount paid by the following plaintiff you found were overcharged.

| | |
|---|---|
| **Cynthia Karol**<br>(S. Attleboro, MA) | $117,578. |
| **John Sullivan**<br>(Scituate, MA) | $25,000. |
| **Akmal, Inc.**<br>(Akmal Moawed)<br>(South Boston, MA) | $42,264. |
| **Sid Prashad**<br>(Worcester, MA) | $69,270. |
| **Mac's Shell Service** (#1)<br>(Francis Marcoux)<br>(Southbridge, MA) | $181,355. |
| **Mac's Shell Service** (#2)<br>(Francis Marcoux)<br>(Webster, MA) | $106,609. |
| **RAM Corp.**<br>(Richard Melanson)<br>(Southbridge, MA) | $135,940. |
| **J&M Avramidis, Inc.**<br>(Jordan Avramidis)<br>(Walpole, MA) | $98,824. |

**Stephen Pisarczyk** $62,142.
(West Boylston, MA)

Please answer next Question 13.

**Affirmative Defense. Releases.**

13. Did Plaintiffs Sullivan and Ram Corporation validly release their claims against defendants?

| | | |
|---|---|---|
| Sullivan | **YES** ___ | **NO** ✓ |
| Ram Corporation | **YES** ___ | **NO** ✓ |

[12/8/04] /s/
DATE FOREPERSON

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MASSACHUSETTS**

| | |
|---|---|
| MAC'S SHELL SERVICE, INC., et al.,<br>Plaintiffs,<br>v.<br>SHELL OIL COMPANY, INC., SHELL OIL PRODUCTS COMPANY LLC (f/k/a SHELL OIL PRODUCTS COMPANY), and MOTIVA ENTERPRISES, LLC<br>Defendants. | C.A. No.:<br>01-CV-11300-RWZ |

**MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW OR, IN THE ALTERNATIVE, FOR A NEW TRIAL**

Defendants Shell Oil Company, Shell Oil Products Company LLC and Motiva Enterprises, LLC (collectively, "defendants") respectfully submit this memorandum in support of their motion under Fed. R. Civ. P. 50 and 59 for judgment as a matter of law or, in the alternative, for a new trial.

* * * * *

**III. DEFENDANTS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW OR, IN THE ALTERNATIVE, A NEW TRIAL AS TO PLAINTIFF'S CLAIM OF CONSTRUCTIVE TERMINATION.**

### A. Plaintiffs Failed to Establish That Their Franchises Were Constructively Terminated as a Result of the Termination of the Rent Subsidy Programs.

To establish a violation of the PMPA, a plaintiff has the initial burden of proving that there has been either a termination of the franchise or nonrenewal of the franchise relationship within the meaning of the Act. *See Chestnut Hill Gulf, Inc. v. Cumberland Farms, Inc.*, 940 F.2d 744, 748 (1st Cir. 1991). The case law is also clear that under the PMPA there are three elements or components of the franchise relationship—the right to occupy the premises, the right to receive branded fuel, and the right to use the franchisor's trademark—and unless there has been a nonrenewal or termination of one of these rights, there is no PMPA violation. Failure to satisfy that burden is fatal to a franchisee's action under the PMPA, since it is only the act of termination or nonrenewal of one of these elements which gives rise to a PMPA claim. *See Beachler v. Amoco Oil Co.*, 112 F.3d 902, 905 (7th Cir. 1997).

Numerous courts have concluded that the statute itself does not permit a claim for constructive termination but rather requires proof of an actual termination. *See, e.g., Jet, Inc. v. Shell Oil Co.*, No. 02-C-2289, 2002 U.S. Dist. LEXIS 22951, at *13-14 (N.D. Ill. Nov. 22, 2002) ("[t]he plain language of the statute contemplates an actual ending of the franchise relationship and therefore does not support a cause of action for constructive termination"), *aff'd*, 381 F.3d 627 (7th Cir. 2004); *Abrams Shell v. Shell Oil Co.*, 216 F. Supp. 2d 634, 641 (S.D. Tex. 2002) (holding that PMPA does not provide cause of action for constructive termination where plaintiffs did not allege

that defendants actually terminated any of the three elements of a franchise), *aff'd*, 343 F.3d 482 (5th Cir. 2003).

Other courts have not reached the issue of whether such a claim exists because they found that the plaintiffs' claims were based on the termination or breach of programs or provisions other than one of the three elements of the franchise relationship.[15] *See e.g. Majocka v. Getty Petroleum Corp.*, No. 89-2471-Z, 1991 U.S. Dist. LEXIS 5396, at *6-8 (D. Mass. 1991) (failure to perform in accordance with oral promises not incorporated into integrated franchise agreements could not form basis of claim for constructive termination under PMPA; parol evidence barred oral modification of contract, and therefore there could be no claim that defendant breached franchise agreement or that its conduct otherwise resulted in termination of plaintiff's franchise); *Moro v. Shell Oil Co.*, 91 F.3d 872, 875 (7th Cir. 1996) (holding termination of plaintiff's credit line could not amount to constructive termination of franchise because written dealer agreement did not require defendant to accept

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[15] The same is true here. Even assuming plaintiffs have proven that the leases were amended to require an ongoing rent subsidy and that this new provision was breached, there has never been any claim that Shell terminated plaintiffs' right to occupy the premises. At most, plaintiffs' claim is that the breach (the ending of the STIP programs) had such a devastating financial impact as to make it economically impossible to continue paying rent. The trial evidence is clear that this claim is factually untrue, and more importantly, it proves too much. If this type of allegation is deemed to state a claim under the PMPA, that would necessary open the doors wide to every claim by a dealer that some undesired action by the franchisor constructively terminated that dealer. The courts have repeatedly rejected efforts to turn breach of contract and other claims into federal PMPA claims. *See e.g. Dersch Energies, Inc. v. Shell Oil Co.*, 314 F.2d 846, 866 (7th Cir. 2002); *Abrams*, 216 F. Supp. 2d 634; *Majocka*, 1991 U.S. Dist. LEXIS 5396; *Moro*, 91 F.3d 872.

credit); *May-Som Gulf, Inc. v. Chevron, U.S.A., Inc.*, 869 F.2d 917, 925 (6th Cir. 1989) (holding elimination of certain dealer support services could not give rise to claim for constructive termination where "such arrangements are not part of a franchise under the PMPA and do not create rights under the PMPA"); *Clark v. BP Oil Co.*, 137 F.3d 386, 391-92 (6th Cir. 1998) (same).

As discussed in section II.A. above, neither oral statements regarding the duration of the rent subsidy programs nor Shell's course of conduct with respect to those programs could modify the terms of the lease agreements as to the stated rent in the contracts. For that reason, the rent subsidy programs were extra-contractual programs that did not constitute a component of the franchise relationship, and therefore elimination of the STIP rent subsidy programs as of December 31, 1999 could not constitute a constructive termination of plaintiffs' franchises.[16]

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[16] In addition, certain plaintiffs' testimony as to alleged oral promises was limited to the duration of the VRP *only*. For example, plaintiff Karol testified about one conversation with Territory Manager Dennis Nielsen, who purportedly told her that "the VRP would never be discontinued." (Karol Test., Day 2, p. 26). She further testified that she never again asked anyone from Shell after that single conversation whether the VRP would remain in place. *Id.* pp. 27-28. Similarly, plaintiff Marcoux testified only to conversations with Shell representatives who allegedly told him that the VRP "was intended to be a permanent program." (Marcoux Test., Day 5, pp. 86-88, Day 6, p. 9). Plaintiff Melanson testified only that his sales representative told him that "the variable rent program was here to stay." (Melanson Test., Day 6, pp. 47-49). Plaintiff Avramidis likewise testified only as to conversations in which Shell representatives allegedly told him that "the VRP would be there forever." (Avramidis Test., Day 7, p. 131). As to these plaintiffs, any claim of constructive termination necessarily arose when the VRP terminated on August 31, 1998, and thus they were required to commence their action on or before Au-

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### B. No Reasonable Juror Could Have Found that Plaintiffs' Franchises Were "Constructively Terminated" by the Elimination of the STIP Subsidy.

The jury found that Shell constructively terminated the franchises of all eight plaintiffs by ending the STIP rent subsidy as of December 31, 1999, and requiring them to pay Contract Rent for the remainder of their existing leases. However, five plaintiffs—Mac's Shell, Cynthia Karol, Akmal, Inc., Sid Prashad, and J&M Avramidis—remained in operation through 2003 or beyond and manifestly did not suffer an impact from the termination of the STIP programs that was "so egregious as to amount to a termination of the franchise relationship." (*See* Jury Charge, Day 14, p. 100, lines 14-17.) Similarly, while plaintiffs Pisarczyk, Sullivan and Melanson sold their franchises, they did so for reasons independent of the change in rent and without suffering "egregious" harm from the elimination of the STIP programs. The evidence as to each plaintiff was as follows:

**i. Mac's Shell.** Mac's Shell's two stations paid Contract Rent from January 2000 through October 2001, when they entered into the new Motiva leases. The termination of the STIP subsidy programs resulted in an increase in the annual rent at Mac's Southbridge station of only $3109 (or 5%), from $61,784 in 1999 to $64,893 in 2000. (Pl. Ex. 804, attached to Defs. App.) In 2001, the rent decreased to $63,580, an overall increase of only $1,796 (or 2.9%) over the $61,784 it had paid in 1999. *Id.*

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gust 31, 1999 to satisfy the PMPA's one year statute of limitations. 15 U.S.C. § 2805. Their failure to commence this action until July 26, 2001 therefore bars their claims for constructive termination under the PMPA.

The same pattern occurred at Mac's Webster station. In 1999, under the STIP subsidy, plaintiff paid an annual rent of $100,003. (Pl. Ex. 805, attached to Defs. App.) In 2000, under a full year of Contract Rent, the rent was $103,636, or an increase of only $3633 (or 3.6%), *Id.* In 2001, when the rent changed from Contract Rent to the new Motiva rent on November 1, the rent was $96,482, or $3521 *less* than the subsidized STIP rent—an amount that almost completely offset the modest increase in rent during the prior year. *Id.* The net increase in rent for this station for the two years was $112.

By finding liability in favor of Mac's Shell on Claim B, the jury in effect concluded that having to pay an increased rent of $5,017 ($4,905 plus $112) for the two stations over two years—an average increase of $1,250 per station per year (or 1.5%)—had an impact "so egregious as to amount to a termination of the franchise relationship." Given that Mac's Shell had gross profits minus rent of $1,091,691 in 2000 and $1,147,966 in 2001[17] (Defs. Ex. 1511, attached to Defs. App.), there is no legally sufficient evidentiary basis on which a reasonable jury could base the conclusion that these *de minimis* rent increases amounted to a "constructive termination" of Mac's Shell's franchise.

**ii. Cynthia Karol.** The profitability of Ms. Karol's station increased after the elimination of the rent subsidy programs. While Ms. Karol's rent did go up from $59,447 in 1999 to $99,120 in 2000 when the STIP program ended (Pl. Ex. 800, attached to Defs. App.), this increase only

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[17] Gross profits minus rent more accurately measures the impact of rent on the profitability of the business because it looks not just at rent but also at revenues. In other words, one cannot determine whether a rent increase, even a significant one, threatens the viability of a dealer without also looking at revenues and profits.

lasted 13 months. In February 2001, she entered into a new Motiva lease, and her annual rent dropped to $66,371, or only $577 per month more than under the STIP programs. *Id.* More importantly, for purposes of assessing under Claim B whether the impact of the rent increase was so egregious as to cause a constructive termination of her franchise, the gross profits minus rent for her station increased from $299,218 in 1999 to $332,990 in 2000 and to an average of over $350,000 per year for the period 2000 through 2003. (Defs. Ex. 1541, attached to Defs. App.) Because the evidence established that Ms. Karol's gross profits increased even after taking into account her higher rent payments, there is no factual basis to conclude she could not afford to remain at the premises or that her franchise was constructively terminated.

**iii. Akmal, Inc.** Akmal, Inc.'s gross profits minus rent also went up substantially after the end of the STIP program, despite an increase in rent. In 1999, the last year of the STIP program, Akmal's gross profits minus rent were $188,366, but averaged over $235,000 annually from 2000 through 2003. (Defs. Ex. 1509, attached to Defs. App.) This evidence does not provide a legally sufficient basis to support a finding of constructive termination.

**iv. RAM Corporation.** RAM Corporation sold its franchise to another lessee-dealer in 2001 for $125,000. Although RAM's rent increased following the elimination of the STIP subsidy from $69,734 in 1999 to $92,713 in 2000 (Pl. Ex. 812, attached to Defs. App.), its net income simultaneously doubled from $28,022 in 1999 to $56,989 in 2000 and increased again to $63,372 from January through September 2001.[18] (*See* Defs. Ex. 1518, attached

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[18] This amount excludes the $125,000 sales price of the franchise.

to Defs. App.) Its gross profits minus rent increased from $324,408 in 1999 to $341,782 in 2000 under the full Contract Rent. (Defs. Ex. 1519) As RAM's president Richard Melanson acknowledged at trial, at the time he sold the franchise in 2001 the station "looked pretty good profit-wise." (Melanson Test., Day 7, p. 44, line 16.) No reasonable jury could conclude that this evidence established a constructive termination.[19]

**v. Stephen Pisarczyk**. The trial record also does not support the conclusion that Stephen Pisarczyk's franchise was constructively terminated because of the elimination of the STIP subsidy. Mr. Pisarczyk testified that he had wanted to purchase his station at 114 West Boylston Street "from day one when I first received the lease there." (Day 9, p. 57, lines 20- 23). His goal was realized when his son purchased the station from Motiva in the summer of 2000 (*id.*, p. 58, lines 9-15). Mr. Pisarczyk never even suggested during his testimony that his actions were influenced in any way by the elimination of the rent subsidy.

**vi. Sid Prashad**. Sid Prashad's subsidized STIP rent ended on December 31, 1999. He paid Contract Rent for only seven months from January 1 until August 1, 2000, when he entered into a new Motiva lease. Although his Contract Rent was higher than his rent under the STIP program, his gross profits minus rent also increased in 2000. Mr. Prashad's gross profits minus rent in 2000, the one year he was subject to Contract Rent, were $94,286,

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[19] The fact that plaintiffs' gross profits minus rent went up despite the increase in their rents validates Shell's conclusion that its previous subsidized rents were well below market level. *See* Testimony of Michael Hanley, Day. 12, p. 5, lines 7-11 (noting that under the VRP, "Shell had very low actual net rents, very low, much below the industry.")

compared to $71,031 in 1999, when the STIP programs were in effect. (Defs. Ex. 1550, attached to Defs. App.) This evidence does not provide a legally sufficient basis to support a finding of constructive termination.

**vii. John Sullivan.** Plaintiff Sullivan's income increased after the elimination of the rent subsidy. He paid Contract Rent for only five months, from January through May, 2000. He sold his franchise in October, 2000, after he had begun to pay rent under the new Motiva leases. His net income was negative $17,626 in 1999 when he was subject to the STIP subsidy; it increased to a positive $2,434 in 2000, when he paid Contract Rent for five months of the year and rent under the new Motiva lease for four months until he sold his franchise in October 2000. (Defs. Ex. 1554, attached to Defs. App.) No reasonable juror could conclude that having to pay an increased rent for only five months during a year in which net income went up by $20,000 caused such egregious harm as to establish a constructive termination of Mr. Sullivan's franchise relationship.

**viii. J&M Avramidis.** Plaintiff J&M Avramidis paid Contract Rent from January, 2000 until April 1, 2002. Its rent increased only moderately by 15% when it transitioned from STIP rent to Contract Rent (from $47,772 in 1999 to $55,701 in 2000), and by another 10% (to $61,248) in 2001. (Pl. Ex. 817, attached to Defs. App.) During this same time, the compensation of the four officers (Jordan Avramidis, his brother, and each of their wives) increased from $62,400 in 1999, to $63,600 in 2000, and went back to $62,400 in 2001. (Defs. Ex. 1520, attached to Defs. App.) While gross profits minus rent declined from $109,379 in 1999 to $105,789 in 2000, and to $88,479 in 2001, this decline was part of a steady trend that began in 1996 when the VRP was in effect. (Defs.

Ex. 1521, attached to Defs. App.) Against this backdrop of deteriorating profitability that began in 1996, continued for three more years while the subsidy programs were in effect, and continued for the 15 months of Contract Rent and thereafter, the relatively modest rent increases during the Contract Rent period were not so extreme as to result in a constructive termination.

Plaintiffs' constructive termination claim necessarily is limited to the period each plaintiff was charged Contract Rent. Their theory appears to be that they can establish constructive termination if they experienced any economic harm whatsoever, which, of course, most of them did in the sense that their rent expense went up. Plaintiffs' theory proves too much, however, because dealers' expenses (for rent, labor, convenience store items, etc.) are almost always going up, and not every increase can establish a PMPA violation. Under the Court's charge, the amount and duration of the additional expense, measured separately for each plaintiff, must have had an impact so egregious as to be the equivalent of a termination; that is, a situation in which the plaintiff could no longer economically afford to remain at the premises. Based on the financial evidence presented for each plaintiff, no reasonable juror could have concluded that the additional rent expense had such an effect as to any plaintiff. Five of the plaintiffs remained in operation throughout the damages period (December 2003) so they could not have been constructively terminated in 2000 or 2001. None of the other three plaintiffs (RAM, Sullivan, and Pisarczyk) who decided to sell their franchises had rent increases that were so egregious as to be the equivalent of a termination. Although judgment as a matter of law is the appropriate remedy, a new trial is necessary at a minimum

because the jury's verdict is so contrary to the substantial weight of the evidence.

* * * * *

## IV. DEFENDANTS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW OR, IN THE ALTERNATIVE, A NEW TRIAL AS TO PLAINTIFFS' CLAIM OF CONSTRUCTION NONRENEWAL.

### A. The PMPA Does Not Permit a Claim for Constructive Nonrenewal.

The remedial scheme of the PMPA is designed to balance the need to protect independent service station franchisees from arbitrary nonrenewal with the need to maintain franchisors' ability to exercise their business judgment and modify their franchise agreements without undue interference from the courts. *See Chestnut Hill Gulf, Inc. v. Cumberland Farms, Inc.*, 940 F.2d 744, 747 (1st Cir. 1991) (observing that Congress intended PMPA to balance protection of franchisees with needs of franchisors to respond to changing market conditions); *May-Som Gulf, Inc. v. Chevron U.S.A., Inc.*, 869 F.2d 917, 921 (6th Cir. 1989) (acknowledging franchisors' need to adapt economically "in an age of increasing corporate competition").

The PMPA does not require perpetuation of any specific written agreement, but only regulates nonrenewal of the parties' "franchise relationship." *Halder v. Standard Oil Co.*, 642 F.2d 107, 111 (5th Cir. 1981). Thus, it is not a violation of the PMPA for the franchisor to change the rent or other terms of the lease, or even to increase the rent 200% or more. *See Ackley v. Gulf Oil Corp.*, 726 F. Supp. 353, 367-69 (D. Conn.) (objective rental formula applied uniformly to all franchisees did not violate PMPA even though franchisee rents increased up to 167%),

*aff'd*, 889 F.2d 1280 (2d Cir. 1989); *Munno v. Amoco Oil Co.*, 488 F. Supp. 1114, 1117, 1121 (D. Conn. 1980) (no violation of PMPA where decision to change leases was made in good faith, even when it resulted in rent increase of 200-300%).

To equalize the parties' bargaining power at the time of renewal, Congress created a mandatory notify-and-wait procedure before a franchisor may nonrenew a franchise relationship. 15 U.S.C. §§ 2802(a), 2804. If the franchisor and franchisee are unable to agree on renewal terms, the franchisor must issue a formal, written notice of nonrenewal. 15 U.S.C. § 2802(b)(1)(a). This triggers a 90-day waiting period during which the existing relationship is preserved, and during which the franchisee may seek a preliminary injunction under a relaxed standard to maintain the status quo while the parties litigate the franchisor's proposed renewal terms. *Id.* §§ 2804(a)(2), 2805(b).

This precise statutory structure guarantees franchisees a three-month period in which to consider the proposed new terms and either challenge them or accept them. The statute requires franchisees to make a clear choice between accepting proposed renewal terms or rejecting and litigating them, and courts cannot simply overlook a franchisee's failure to follow these statutory requirements. "It was Congress's choice to force dealers to face such a . . . [decision] in order to trigger the protections of the PMPA. And it is up to Congress, not this court, to decide when a dealer may invoke the protections of this statutory scheme." *Clark v. BP Oil Co.*, 137 F.3d 386, 394-95 (6th Cir. 1998) (refusing to recognize a cause of action for "anticipatory nonrenewal" that is not expressly provided in the PMPA).

Here, however, plaintiffs actually signed the renewal agreements proposed by Motiva, which included the new rental amounts. Because they chose to sign the new agreements, none of the plaintiffs triggered the statutory procedure for the issuance of a formal notice of nonrenewal, after which they could have sought a preliminary injunction within the 90-day waiting period as prescribed by the PMPA.[20] As the Seventh Circuit has held, where a franchisee signs a renewal agreement rather than allowing a notice of termination to issue, the franchisee has "divested itself of the right to bring an action under the PMPA." *Dersch Energies, Inc. v. Shell Oil Co.*, 314 F.3d 846, 866 (7th Cir. 2002) (noting that unless it triggers statutory notification mechanism, a franchisee cannot transform "a mere contract dispute into a non-renewal" claim.) Accordingly, defendants are entitled to judgment as a matter of law on this claim.

* * * * *

[Dated: February 28, 2005]

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[20] Plaintiffs may argue that filing this lawsuit is the same thing as refusing to sign the renewal agreement. First of all, plaintiffs Karol, Sullivan, Prashad and RAM Corporation all had sold their stations or signed the new Motiva leases before this lawsuit was filed in July 2001. Second, as to all plaintiffs, their failure to either challenge or sign has led to increased damages exposure to defendants. If plaintiffs had refused to sign, there would be no basis for Motiva to charge the new rents. But because plaintiffs did sign, they were charged the new rents on which they are now basing their damage claims. The PMPA expressly prohibits a franchisee from having it both ways—signing (paying the new rents) and challenging (seeking damages on the new rents), as plaintiffs are doing here.

# UNITED STATES DISTRICT COURT
# DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 01-11300-RWZ

FRANCIS MARCOUX, ET AL.,

v.

SHELL OIL PRODUCTS CO., INC.
AND MOTIVA ENTERPRISES, LLC

## ORDER ON TRIAL AND POST-TRIAL MOTIONS

**September 19, 2005**

ZOBEL, D.J.

Sixty Shell Oil dealers brought this action for breach of contract and violations of the Petroleum Marketing Practices Act ("PMPA"). Because the individual claims are, for the most part, unique, the case is not amenable to class action treatment. The Court did, however, order an initial trial of the claims of ten plaintiffs which was held from November 15 to December 8, 2004 and resulted in a verdict for those plaintiffs.[1]

*Plaintiff's motion for limited reconsideration of the entry of summary [judgment] against plaintiff Stephen Pisarczyk* (#296 on the docket)

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[1] Sixty plaintiffs filed suit. Eighteen voluntarily dismissed their claims in 2002. From the remainder, the Court randomly selected ten for the first trial. One settled on the eve of trial, and the other nine tried to verdict.

The motion was denied.

*Defendants' motion for reconsideration of the decision on their motion for summary judgment* (#297 on the docket)

The motion was denied.

*Defendants' motion in limine regarding damages evidence* (#298 on the docket)

The motion is denied as moot.

*Defendants' motion in limine to exclude the proposed expert testimony of Brian Gorin* (#299 on the docket)

The motion was denied.

*Defendants' motion in limine regarding evidence relating to defendants' pricing to non-lessee dealers* (#302 on the docket)

The motion is denied as moot.

*Plaintiffs' motion for special verdict* (#314 on the docket)

The motion was allowed.

*Defendants' motion for judgment as a matter of law* (#322 on the docket)

The Court reserved on the motion and will revisit it in connection with its renewal #352.

*Defendants' supplemental motion for special verdict* (#329 on the docket)

The motion was denied as to the form of defendants' proposal, although the Court submitted special questions to the jury.

*Defendants' motion for special verdict* (#350 on the docket)

The motion was allowed.

*Defendants' motion for jury instructions* (#351 on the docket)

The motion was allowed in part and denied in part.

Both parties also filed a number of post-trial motions and proposed findings and rulings addressed below.

*Plaintiffs' motion for a permanent injunction* (#341 on the docket)

The motion is denied. Neither the PMPA nor the record in this case support the requested recalculation of rent.

*Plaintiffs' motion for an award of punitive damages for willfulness under the PMPA* (#342 on the docket)

The motion is denied. Although the jury found constructive termination and constructive non-renewal of certain lease agreements, I am not convinced that defendants acted in willful disregard of the PMPA and that punitive damages are appropriate. The evidence showed at least two reasons for defendants' conduct that mitigate against the imposition of exemplary damages.

First, the entire industry was changing the manner of computing rent. Whereas Shell and some others had based the amount of rent on the amount of gas purchased, the industry and defendants switched to a formulation based on the value of the station's real estate. That decision followed a change in the use of gas stations from simply selling gasoline and oil to including also convenience stores and other amenities. It also reflected a reasonable business decision to improve defendants' return on their investment in the real estate.

Second, during the period in question, Shell had merged with Texaco, and the combined company had to evolve a uniform rent structure. These business realities were, at least, partially responsible for the rent program

of which plaintiff[s] complained, and they compel denial of any award of punitive damages.

*Plaintiffs' proposed findings of fact and rulings of law on Count III* (#343 on the docket)

In order to establish a violation of Mass. Gen. Laws ch. 93A, § 11, plaintiffs "must show that the defendant[s'] actions fell 'within at least the penumbra of some common-law, statutory, or other established concept of unfairness,' or were 'immoral, unethical, oppressive or unscrupulous' . . ." *Damon v. Sun Co., Inc.*, 87 F.3d 1467, 1484 (1st Cir. 1996). For the same reasons that defendants are not liable for willful disregard and punitive damages under the PMPA, I find the defendants not liable on Count III.

*Defendants' motion for judgment as a matter of law, or, in the alternative, for a new trial* (#352 on the docket)

Defendants again raise a number of legal issues concerning the viability of plaintiffs' claims. I have previously addressed them in the context of a motion for summary judgment, rulings on evidence and defendants' motions during trial under Rule 50. I adhere to those rulings.

Defendants' arguments that the verdict is not supported by the evidence ignores the jury's right to draw conclusions from the evidence different from the conclusions the parties might reach. The jury is not required to accept calculations by the parties' experts. It may make its own calculations based on the evidence even if they lead to a result different from that reached by the expert. The evidence in this case permitted the jury's findings both as to liability and damages.

Defendants complain that they were not allowed sufficient time to present their case. First, the Court explained to all counsel before the case began the strictures on time, namely, that there would be fourteen trial days. Second, while it is true that plaintiffs used more time than allotted, a not insignificant part of the excess was attributable to lengthy cross-examination by defendants.

Defendants' motion for judgment as a matter of law is denied as is the alternative, their motion for a new trial.

*Defendant's motion for leave to file memorandum in excess of 20 pages* (#353 on the docket)

The motion is allowed.

*Plaintiffs' motion for leave to file reply* (#354 on the docket)

The motion is allowed.

*Plaintiffs' motion to file brief in excess of twenty pages* (#361 on the docket)

The motion is allowed.

*Defendants' motion for leave to file a reply* (#365 on the docket)

The motion is allowed.

_____
DATE

/s/ Rya W. Zobel
RYA W. ZOBEL
UNITED STATES DISTRICT JUDGE

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MASSACHUSETTS**

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CIVIL ACTION NO. 01-11300-RWZ

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MAC'S SHELL SERVICE, INC., JOHN A. SULLIVAN, RAM CORPORATION, INC., STEPHEN PISARCZYK, CYNTHIA KAROL, J&M AVRAMIDIS, INC., SID PRASHAD, THREE K'S, INC. AND AKMAL, INC.,

*Plaintiffs,*

v.

SHELL OIL COMPANY, INC., SHELL OIL PRODUCTS COMPANY, LLC (F/K/A SHELL OIL PRODUCTS COMPANY), AND MOTIVA ENTERPRISES, LLC

*Defendants.*

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**JUDGMENT**

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**October 27, 2006**

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Based upon (i) the Jury's Special Verdict dated December 8, 2004, (ii) the September 19, 2005 Order on Trial and Post-Trial Motions, (iii) the Joint Motion for Entry of Separate Judgment Pursuant to Fed. R. Civ. P. 54(b) dated January 24, 2006, and (iv) the August 31, 2006 Memorandum of Decision, **IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:**

1. With respect to the claims asserted by Plaintiffs, John A. Sullivan, RAM Corporation, Inc., Stephen Pisarczyk, Cynthia Karol, Mac's Shell Service, Inc., J&M Avramidis, Inc., Sid Prashad, Three K's, Inc. and Akmal,

Inc., and for the reasons set forth in the parties' Joint Motion for Entry of Separate Judgment Pursuant to Fed. R. Civ. P. 54(b), it is this Court's determination that there is "no just reason for delay" in entering judgment. Accordingly, judgment shall enter as set forth below.

2. Judgment in favor of Plaintiff **John A. Sullivan** against Defendants, Shell Oil Company, Shell Oil Products Company, and Motiva Enterprises LLC, jointly and severally, on Counts II, V, and VI as follows:

(i) As to Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $23,271.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts averaged $4,654.20 a month, began on January 1, 2000 and ended on June 1, 2000 when plaintiff entered into a Motiva lease; prejudgment interest is awarded on these amounts at the annual rate of 3.08% and shall run from the date each payment would have been made to the date of entry of judgment; and (3) additional damages in the amount of $100,000.00, with prejudgment interest at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.[1]

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[1] The interest rates applied to damages for loss of the STIP subsidy (3.08%), excess rent (2.85%), lost business value (2.75%), and the additional unspecified damage awards (2.75%) are those identified in Defendants' Memorandum of Law Regarding Rate of Prejudgment Interest on PMPA Claims dated January 24, 2006. Defendants calculated what the damages and prejudgment interest amounts were as of January 1, 2006 for the Constructive Termination, Constructive Non-Renewal and Breach of Lease claims, respectively, and set those calculations forth in Exhibit B to the Joint Motion For Entry

(ii) As to Count II (Violation of the PMPA based on Constructive Non-Renewal of the franchise relationship), Judgment as follows: (1) damages for excess rent in the amount of $5,460.00; (2) based on the evidence presented by plaintiffs' expert, the excess rent payments were $1,365 a month, began on June 1, 2000, and ended September 30, 2000 when plaintiff sold his station; prejudgment interest is awarded on these amounts at an annual rate of 2.85% and shall run from the date of each overcharge to the date of entry of judgment; and (3) additional damages in the amount of $100,000.00, with prejudgment interest at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(iii) As to Count V (Breach of the Lease), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $23,271.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts averaged $4,654.20 a month, began on January 1, 2000 and ended on June 1, 2000 when plaintiff entered a Motiva lease; prejudgment interest is awarded on these amounts at an annual rate of 12% and shall run from the date each payment would have been made to the date of entry of judgment; and (3) additional damages in the amount of $100,000.00, with prejudgment interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment.

(iv) As to Count VI (Breach of the Supply Contract–Open Price Term), Judgment in the amount of $25,000.00, with prejudgment interest at an annual

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of Separate Judgment Pursuant to Fed. R. Civ. P. 54(b) filed by the parties on January 24, 2006.

rate of 12% from December 31, 2003 to the date of entry of judgment.

(v) Because plaintiff's claims under Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship) and under Count V (Breach of the Lease) sought the same damages for loss of the STIP subsidy and lost business value and the jury awarded the same damages, plaintiff is entitled to recover as to those two awards only once. Because the prejudgment interest rate is different for the two Counts, plaintiff shall be awarded the higher damage award.

3. Judgment in favor of Plaintiff **RAM Corporation, Inc.** against Defendants, Shell Oil Company, Shell Oil Products Company, and Motiva Enterprises LLC, jointly and severally, on Counts II, V, and VI as follows:

(i) As to Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $66,011.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts began on January 1, 2000, averaged $3,103.75 a month during that year, averaged $5,753.20 from January, 2001 through May 31, 2001, and ended on June 1, 2001 when plaintiff entered into a Motiva lease; prejudgment interest is awarded on these amounts at an annual rate of 3.08% and shall run from the date each payment would have been made to the date of entry of judgment; and (3) additional damages in the amount of $40,000.00, with prejudgment interest at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(ii) As to Count II (Violation of the PMPA based on Constructive Non-Renewal of the franchise relationship), Judgment as follows: (1) damages for excess rent in the amount of $13,644.00; (2) based on the evidence presented by plaintiffs' expert, the excess rent payments began on June 1, 2001, were $3,411.00 a month from that date through September 30, 2001 when plaintiff sold his station; prejudgment interest is awarded on these amounts at an annual rate of 2.85% and shall run from the date of each overcharge to the date of entry of judgment; and (3) additional damages in the amount of $40,000.00, with prejudgment interest at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(iii) As to Count V (Breach of the Lease), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $66,011.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts began on January 1, 2000, averaged $3,103.75 a month during that year, averaged $5,753.20 from January, 2001 through May 31, 2001, and ended on June 1, 2001 when plaintiff entered into a Motiva lease; prejudgment interest is awarded on these amounts at an annual rate of 12% and shall run from the date each payment would have been made to the date of entry of judgment; and (3) additional damages in the amount of $40,000.00, with prejudgment interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment.

(iv) As to Count VI (Breach of the Supply Contract–Open Price Term), Judgment in the amount of $135,940.00 with prejudgment interest at an annu-

al rate of 12% from December 31, 2003 to the date of entry of judgment.

(v) Because plaintiff's claims under Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship) and under Count V (Breach of the Lease) sought the same damages for loss of the STIP subsidy and lost business value and the jury awarded the same damages, plaintiff is entitled to recover as to those two awards only once. Because the prejudgment interest rate is different for the two Counts, plaintiff shall be awarded the higher damage award.

4. Judgment in favor of Plaintiff **Stephen Pisarczyk** against Defendants, Shell Oil Company, Shell Oil Products Company, and Motiva Enterprises LLC, jointly and severally, on Counts II, V, and VI as follows:

(i) As to Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $19,557.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts began on January 1, 2000, averaged $2,793.00 a month, and ended on August 1, 2000; prejudgment interest is awarded on the amounts at an annual rate of 3.08% and shall run from the date each payment would have been made to the date of entry of judgment; (3) damages at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment; and (4) additional damages in the amount of $50,000.00, with prejudgment interest at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(ii) As to Count II (Violation of the PMPA based on Constructive Non-Renewal of the franchise relationship), Judgment as follows: (1) damages for lost business value in the amount of $46,991.00 and additional damages in the amount of $50,000; and (2) prejudgment interest on the $96,991.00 shall be at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(iii) As to Count V (Breach of the Lease), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $19,557.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts began on January 1, 2000, averaged $2,793.00 a month, and ended on August 1, 2000; prejudgment interest is awarded on these amounts at an annual rate of 12% and shall run from the date each payment would have been made to the date of entry of judgment; (3) damages for lost business value in the amount of $46,991.00, with prejudgment interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment; and (4) additional damages in the amount of $50,000.00, with prejudgment interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment.

(iv) As to Count VI (Breach of the Supply Contract–Open Price Term), Judgment in the amount of $62,142.00, with prejudgment interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment.

(v) Because plaintiff's claim under Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship) and under Count V (Breach of the Lease) sought the same damages

for loss of the STIP subsidy and lost business value and the jury awarded the same damages, plaintiff is entitled to recover as to those two awards only once. Because the prejudgment interest rate is different for the two Counts, plaintiff shall be awarded the higher damage award.

5. Judgment in favor of Plaintiff **Cynthia Karol** against Defendants, Shell Oil Company, Shell Oil Products Company, and Motiva Enterprises LLC, jointly and severally, on Counts II, V, and VI as follows:

(i) As to Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $41,257.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts began on January 1, 2000, averaged $3,380.42 a month during that year, were $692.00 in January, 2001, and ended on February 1, 2001 when plaintiff entered into a Motiva lease; prejudgment interest is awarded on these amounts at an annual rate of 3.08% and shall run from the date each payment would have been made to the date of entry of judgment; and (3) damages for lost business value in the amount of $78,290.00, with prejudgment interest at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(ii) As to Count II (Violation of the PMPA based on Constructive Non-Renewal of the franchise relationship), Judgment as follows: (1) damages for excess rent in the amount of $86,557.00; (2) based on the evidence presented by plaintiffs' expert, the excess rent payments began on February 1, 2001,

were $2,249.00 a month from that date through January 31, 2002, were $2,479.00 a month from February 1, 2002 th[r]ough January 31, 2003, and were $2,711 a month from February 1, 2003 th[r]ough December 31, 2003; prejudgment interest is awarded on these amounts at an annual rate of 2.85% and shall run from the date of each overcharge to the date of entry of judgment; and (3) damages for lost business value in the amount of $78,290.00, with prejudgment interest at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(iii) As to Count V (Breach of Lease), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $41,257.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts began on January 1, 2000, averaged $3,380.42 a month during that year, were $692.00 in January, 2001, and ended on February 1, 2001 when plaintiff entered into a Motiva lease; prejudgment interest is awarded on these amounts at an annual rate of 12% and shall run from the date each payment would have been made to the date of entry of judgment; and (3) damages for lost business value in the amount of $78,290.00, with interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment.

(iv) As to Count VI (Breach of the Supply Contract–Open Price Term), Judgment in the amount of $117,578.00, with prejudgment interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment.

(v) Because plaintiff's claims under Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship) and under Count V (Breach of the Lease) sought the same damages for loss of the STIP subsidy and lost business value and the jury awarded the same damages, plaintiff is entitled to recover as to those two awards only once. Because the prejudgment interest rate is different for the two Counts, plaintiff shall be awarded the higher damage award.

6. Judgment in favor of Plaintiff **Mac's Shell Service, Inc., Southbridge Shell**, against Defendants, Shell Oil Company, Shell Oil Products Company, and Motiva Enterprises LLC, jointly and severally, on Counts II, V, and VI as follows:

(i) As to Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $58,602.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts began on January 1, 2000, averaged $2,919.25 a month during that year, averaged $2,357.10 a month from January 1, 2001 through October 31, 2001, and ended on November 1, 2001 when plaintiff entered into a Motiva lease; prejudgment interest is awarded on these amounts at an annual rate of 3.08% and shall run from the date each payment would have been made to the date of entry of judgment; and (3) damages for lost business value in the amount of $99,962.00, with prejudgment interest at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(ii) As to Count II (Violation of the PMPA based on Constructive Non-Renewal of the franchise relationship), Judgment as follows: (1) damages for excess rent in the amount of $80,220.00; (2) based on the evidence present by plaintiffs' expert, the excess rent payments began on November 1, 2001, were $2,950.00 a month from that date through October 31, 2002, were $3,170.00 a month from November 1, 2002 th[r]ough October 31, 2003, and were $3,389.00 a month from November 1, 2003 th[r]ough December 31, 2003; prejudgment interest is awarded on these amounts at an annual rate of 2.85% and shall run from the date of each overcharge to the date of entry of judgment; and (3) damages for lost business value in the amount of $99,962.00, with prejudgment interest at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(iii) As to Count V (Breach of the Lease), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $58,602.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts began on January 1, 2000, averaged $2,919.25 a month during that year, averaged $2,357.10 a month from January 1, 2001 through October 31, 2001, and ended on November 1, 2001 when plaintiff entered into a Motiva lease; prejudgment interest is awarded on these amounts at an annual rate of 12% and shall run from the date each payment would have been made to the date of entry of judgment; and (3) damages for lost business value in the amount of $99,962.00, with prejudgment interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment.

(iv) As to Count VI (Breach of the Supply Contract–Open Price Term), Judgment in the amount of $181,355.00, with prejudgment interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment.

(v) Because plaintiff's claims under Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship) and under Count V (Breach of the Lease) sought the same damages for loss of the STIP subsidy and lost business value and the jury awarded the same damages, plaintiff is entitled to recover as to those two awards only once. Because the prejudgment interest rate is different for the two Counts, plaintiff shall be awarded the higher damages award.

7. Judgment in favor of Plaintiff **Mac's Shell Service, Inc., Webster Shell**, against Defendants, Shell Oil Company, Shell Oil Products Company, and Motiva Enterprises LLC, jointly and severally, on Counts II, V, and VI as follows:

(i) As to Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $89,335.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts began on January 1, 2000, averaged $3,885.50 a month during that year, averaged $4,270.90 a month from January 1, 2001 through October 31, 2001, and ended on November 1, 2001 when plaintiff entered into a Motiva lease; prejudgment interest is awarded on these amounts at an annual rate of 3.08% and shall run from the date each

payment would have been made to the date of entry of judgment; and (3) damages for lost business value in the amount of $97,247.00, with prejudgment interest at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(ii) As to Count II (Violation of the PMPA based on Constructive Non-Renewal of the franchise relationship), Judgment as follows: (1) damages for excess rent in the amount of $68,186.00; (2) based on the evidence presented by plaintiffs' expert, the excess rent payments began on November 1, 2001, were $2,425.00 a month from that date through October 31, 2002, were $2,746.00 a month from November 1, 2002 th[r]ough October 31, 2003, and were $3,067.00 a month from November 1, 2003 th[r]ough December 31, 2003; prejudgment interest is awarded on these amounts at an annual rate of 2.85% and shall run from the date of each overcharge to the date of entry of judgment; and (3) damages for lost business value in the amount of $97,247.00 with prejudgment interest at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(iii) As to Count V (Breach of the Lease), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $89,335.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts began on January 1, 2000, averaged $3,885.50 a month during that year, averaged $4,270.90 a month from January 1, 2001 through October 31, 2001, and ended on November 1, 2001 when plaintiff entered into a Motiva lease; prejudgment interest is awarded on these amounts at

an annual rate of 12% and shall run from the date each payment would have been made to the date of entry of judgment; and (3) damages for lost business value in the amount of $97,247.00, with prejudgment interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment.

(iv) As to Count VI (Breach of the Supply Contract–Open Price Term), Judgment in the amount of $106,609.00, with prejudgment interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment.

(v) Because plaintiff's claims under Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship) and under Count V (Breach of the Lease) sought the same damages for loss of the STIP subsidy and lost business value and the jury awarded the same damages, plaintiff is entitled to recover as to those two awards only once. Because the prejudgment interest rate is different for the two Counts, plaintiff shall be awarded the higher damage award.

8. Judgment in favor of Plaintiff **J&M Avramidis, Inc.** against Defendants, Shell Oil Company, Shell Oil Products Company, and Motiva Enterprises LLC, jointly and severally, on Counts II, V, and VI as follows:

(i) As to Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $50,388.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts began on January 1, 2000, averaged $1,866.22 a month through March 31, 2002, and ended on

April 1, 2002 when plaintiff entered into a Motiva lease; prejudgment interest is awarded on these amounts at an annual rate of 3.08% and shall run from the date each payment would have been made to the date of entry of judgment; and (3) damages for lost business value in the amount of $105,318.00, with prejudgment of interest at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(ii) As to Count II (Violation of the PMPA based on Constructive Non-Renewal of the franchise relationship), Judgment as follows: (1) damages for excess rent in the amount of $63,192.00; (2) based on the evidence presented by plaintiffs' expert, the excess rent payments began on April 1, 2002, were $2,992.00 a month from that date through March 31, 2003, and were $3,032.00 a month from April 1, 2003 th[r]ough December 31, 2003; prejudgment interest is awarded on these amounts at an annual rate of 2.85% and shall run from the date of each overcharge to the date of entry of judgment; and (3) damages for lost business value in the amount of $105,318.00, with prejudgment interest at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(iii) As to Count V (Breach of the Lease), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $50,388.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts began on January 1, 2000, averaged $1,866.22 a month through March 31, 2002, and ended on April 1, 2002 when plaintiff entered into a Motiva lease; prejudgment interest shall be awarded on these amounts at an annual rate of

12% and shall run from the date each payment would have been made to the date of entry of judgment; and (3) damages for lost business value in the amount of $105,318.00, with prejudgment interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment.

(iv) As to Count VI (Breach of the Supply Contract–Open Price Term), Judgment in the amount of $98,824.00, with prejudgment interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment.

(v) Because plaintiff's claims under Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship) and under Count V (Breach of the Lease) sought the same damages for loss of the STIP subsidy and lost business value and the jury awarded the same damages, plaintiff is entitled to recover as to those two awards only once. Because the prejudgment interest rate is different for the two Counts, plaintiff shall be awarded the higher damage award.

9. Judgment in favor of Plaintiff **Sid Prashad** against Defendants, Shell Oil Company, Shell Oil Products Company, and Motiva Enterprises LLC, jointly and severally, on Counts II, V, and VI as follows:

(i) As to Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $17,008.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts began on January 1, 2000, averaged $2,429.71 a month through July 31, 2000, and ended on August 1, 2000 when plaintiff entered into a Motiva

lease; prejudgment interest is awarded on these amounts at an annual rate of 3.08% and shall run from the date each payment would have been made to the date of entry of judgment; and (3) damages for lost business value in the amount of $85,830.00, with prejudgment interest at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(ii) As to Count II (Violation of the PMPA based on Constructive Non-Renewal of the franchise relationship), Judgment as follows: (1) damages for excess rent in the amount of $100,922.00; (2) based on the evidence presented by plaintiffs' expert, the excess rent payments began on August 1, 2000, were $2,159.00 a month from that date through July 31, 2001, were $2,429.00 a month from August 1, 2001 th[r]ough July 31, 2002, and were $2,698.00 a month from August 1, 2002 th[r]ough December 31, 2003; prejudgment interest is awarded on these amounts at an annual rate of 2.85% and shall run from the date of the overcharge to the date of entry of judgment; and (3) damages for lost business value in the amount of $85,830.00, with prejudgment interest at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(iii) As to Count V (Breach of the Lease), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $17,008.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts began on January 1, 2000, averaged $2,429.71 a month through July 31, 2000, and ended on August 1, 2000 when plaintiff entered into a Motiva lease; prejudgment interest is award-

ed on these amounts at an annual rate of 12% and shall run from the date each payment would have been made to the date of entry of judgment; and (3) damages for lost business value in the amount of $85,830.00, with prejudgment interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment.

(iv) As to Count VI (Breach of the Supply Contract–Open Price Term), Judgment in the amount of $69,270.00, with prejudgment interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment.

(v) Because plaintiff's claims under Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship) and under Count V (Breach of the Lease) sought the same damages for loss of the STIP subsidy and lost business value and the jury awarded the same damages, plaintiff is entitled to recover as to those two awards only once. Because the prejudgment interest rate is different for the two Counts, plaintiff shall be awarded the higher damage award.

10. Judgment in favor of Plaintiff **Akmal, Inc.** against Defendants, Shell Oil Company, Shell Oil Products Company, and Motiva Enterprises LLC, jointly and severally, on Counts II, V, and VI as follows:

(i) As to Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $173,198.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts began on January 1, 2000, averaged $3,626.91 a month during that year, averaged $3,552.25 a

month during 2001, and averaged $3,627.00 a month during 2002 and 2003; prejudgment interest is awarded on these amounts at an annual rate of 3.08% and shall run from the date the payment would have been made to the date of entry of judgment; and (3) damages for lost business value in the amount of $44,573.00, with prejudgment interest at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(ii) As to Count II (Violation of the PMPA based on Constructive Non-Renewal of the franchise relationship), Judgment as follows: (1) damages for lost business value in the amount of $44,573.00; and (2) prejudgment interest on the $44,573.00 shall be at an annual rate of 2.75% from December 31, 2003 to the date of entry of judgment.

(iii) As to Count V (Breach of the Lease), Judgment as follows: (1) damages for loss of the STIP subsidy in the amount of $173,198.00; (2) based on the evidence presented by plaintiffs' expert, these lost subsidy amounts began on January 1, 2000, averaged $3,626.91 a month during that year, averaged $3,552.25 a month during 2001, and averaged $3,627.00 a month during 2002 and 2003; prejudgment interest is awarded on these amounts at an annual rate of 12% and shall run from the date the payment would have been made to the date of entry of judgment; and (3) damages for lost business value in the amount of $44,573.00, with prejudgment interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment.

(iv) As to Count VI (Breach of the Supply Contract–Open Price Term), Judgment in the amount of

$42,264.00, with prejudgment interest at an annual rate of 12% from December 31, 2003 to the date of entry of judgment.

(v) Because plaintiff's claims under Count II (Violation of the PMPA based on Constructive Termination of the franchise relationship) and under Count V (Breach of the Lease) sought the same damages for loss of the STIP subsidy and lost business value and the jury awarded the same damages, plaintiff is entitled to recover as to those two awards only once. Because the prejudgment interest rate is different for the two Counts, plaintiff shall be awarded the higher damage award.

11. In summary, the damages amounts for each of the preceding plaintiffs are as follows[2]:

| Plaintiff | Principal and Interest through 9/30/06 | Daily Interest from 9/30/06 |
|---|---|---|
| Sullivan | $326,111.71 | $78.31 |
| RAM | $413,550.96 | $121.11 |
| Pisarczyk | $355,450.15 | $90.40 |
| Karol | $520,780.93 | $125.52 |
| Mac's Shell (Southbridge) | $680,347.51 | $174.05 |
| Mac's Shell (Webster) | $612,817.85 | $155.95 |

[2] A chart showing the breakdown of the damages calculations for each of the counts for each plaintiff is attached as Exhibit A to this Order. In particular, the damages awarded for Count II (Constructive Termination) are duplicative of the damages awarded for Count V (Breach of Lease), so only one of these damages amounts can be awarded.

| | | |
|---|---|---|
| J&M Avramidis | $546,392.93 | $133.38 |
| Prashad | $447,122.28 | $95,04 |
| Akmal, Inc. | $445,459.83 | $134.29 |

12. Judgment in favor of Defendants, Shell Oil Company, Shell Oil Products Company, and Motiva Enterprises LLC against Plaintiffs, **John A. Sullivan**, **RAM Corporation, Inc.**, **Stephen Pisarczyk**, **Cynthia Karol**, **Mac's Shell Service, Inc. (Southbridge and Webster)**, **J&M Avramidis, Inc.**, **Sid Prashad**, and **Akmal, Inc.** as to Counts I (Request for injunctive relief), III (Violation of M.G.L. Chapter 93A), IV (Violation of M.G.L. Chapter 93E), VII (Breach of Implied Warranty of Good Faith and Fair Dealing), VIII (Promissory Estoppel), and IX (Declaratory Judgment).

13. Judgment in favor of Defendants, Shell Oil Company, Shell Oil Products Company, and Motiva Enterprises LLC, against Plaintiff **Three K's, Inc.** as to all claims (Counts I-IX).

14. The Judgment (compensatory damages plus accrued prejudgment interest) will bear post judgment interest at the judgment rate specified by 28 U.S.C. sec. 1961 until fully satisfied.

15. All relief not expressly granted is denied.

16. This Court shall retain jurisdiction of this matter for purposes of the enforcement of the provisions of this Judgment.

SO ORDERED: /s/ Rya W. Zobel
HON. RYA W. ZOBEL
UNITED STATES DISTRICT JUDGE

DATED: [October 27, 2006]

# UNITED STATES DISTRICT COURT
# DISTRICT OF MASSACHUSETTS

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CIVIL ACTION NO. 01-11300-RWZ

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FRANCIS MARCOUX, ET AL.,

v.

SHELL OIL PRODUCTS CO., INC.,
AND MOTIVA ENTERPRISES, LLC

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## MEMORANDUM OF DECISION AND ORDER

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**December 26, 2006**

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ZOBEL, D.J.

Plaintiffs, ten Shell Oil dealers, move for an award of attorneys' fees and expert witness fees pursuant to the Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. § 2805(d)(1)(C). They further move for an award of costs under Fed. R. Civ. P. 54(d) and 28 U.S.C. § 1920, as well as post-judgment interest. For the reasons stated below, plaintiffs' motion is allowed in part.

## I. Background

On July 27, 2001, sixty current and former lessee-dealers of Shell Oil brand automobile gasoline brought this action for breach of contract and violations of the Petroleum Marketing Practices Act ("PMPA") against defendants Shell Oil Company, Inc., Shell Oil Company Products, LLC and Motiva Enterprises, LLC (hereinafter collectively "Shell Oil"). The court ordered an ini-

tial trial of the claims of ten plaintiffs, which was held from November 15 to December 8, 2004, and resulted in a unanimous verdict of $3.3 million for those plaintiffs. (Docket #335). Plaintiffs moved for an award of punitive damages under the PMPA, which the court denied. (Docket #342). The parties jointly moved for entry of judgment pursuant to Fed. R. Civ. P. 54(b), which the court allowed on August 31, 2006 (Docket #397), and entered an order of judgment on October 27, 2006. (Docket #401).

Plaintiffs now seek fees and costs in the amount of $2.78 million.[1] (Docket #387). Specifically, they seek fees for six attorneys in the amount of $2,109,340.30 and for three paralegals in the amount of $129,316.50. Plaintiffs further seek expert fees in the amount of $424,001.53 and costs in the amount of $125,782.94.

Defendants oppose the motion (Docket # 391) [ ] on a number of grounds: that (1) the hourly rate sought in attorneys' fees is in excess of the prevailing rate in the relevant market; (2) plaintiffs have failed to exclude time spent on matters for which no fee is allowed (in particular, claims related to the UCC); (3) that the billing statements reveal duplicative and excessive effort expended by certain attorneys; (4) the expert fees are excessive; and (5) costs are excessive and the sought for expenses not recoverable under the relevant statutes.

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[1] On August 11, 2004, the court sanctioned Shell for their "inexcusable" discovery delays in this case. The court ordered Shell to pay $7,300 in fees and $306.58 in costs. (Docket #261). Plaintiffs have deducted this amount ($7,606.58 in sum) from their total attorneys' and paralegal fees sought ($2,788,411.27). Accordingly, the total award they seek is $2,780,834.69. As discussed at 8 n.4, infra, I similarly deduct $7,606.58 from the attorneys' fees awarded.

## II. Discussion

### A. Plaintiffs' Request for Attorneys' Fees

The PMPA provides that a franchisee who prevails in an action under the statute is entitled to "reasonable attorney and expert witness fees" under 15 U.S.C. § 2805(d)(1)(C).[2] That plaintiffs are entitled to reasonable attorneys' and expert witness fees is uncontroverted. The remaining question, then, concerns the amount of fees to be awarded.

* * * * *

## III. Conclusion

Plaintiffs' motion for attorneys' fees and costs (Docket #387-1) is ALLOWED in part. Defendants are ordered to pay **$1,406,659.40** which is comprised of attorneys' fees in the amount of **$1,163,792.92**; expert witness fees in the amount of **$209,079.59**; costs in the amount of **$33,786.89**; and post-judgment interest at the statutory rate. Plaintiffs' motion requesting a status conference (Docket #403) to discuss future phases of discovery is ALLOWED. A status conference has been scheduled for January 18, 2007 at 3 p.m.

December 26, 2006
DATE

/s/ Rya W. Zobel
RYA W. ZOBEL
UNITED STATES DISTRICT JUDGE

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[2] That section provides, in pertinent part: "If the franchisee prevails in any action under subsection (a) of this section, such franchisee shall be entitled (c) to reasonable attorney and expert witness fees to be paid by the franchisor, unless the court determines that only nominal damages are to be awarded to such franchisee, in which case the court, in its discretion, need not direct that such fees be paid by the franchisor." 15 U.S.C. § 2805(d)(1)(C).

# UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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No. 05-2771

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FRANCIS MARCOUX, ET AL.,
*Plaintiffs,*

MAC'S SHELL SERVICE, INC.; CYNTHIA KAROL; JOHN A. SULLIVAN; AKMAL, INC.; SID PRASHAD; RAM CORPORATION, INC.; J&M AVRAMIDIS, INC.; THREE K'S, INC.; STEPHEN PISARCZYK,
*Plaintiffs-Appellees,*

v.

SHELL OIL PRODUCTS COMPANY LLC; MOTIVA ENTERPRISES LLC; SHELL OIL COMPANY, INC.,
*Defendants-Appellants.*

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Appeal from the United States District Court
for the District of Massachusetts
(Hon. Rya W. Zobel, U.S. District Judge)

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**April 18, 2008**

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Before TORRUELLA, HOWARD, Circuit Judges, and DELGADO-COLÓN,* District Judge.

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* Of the District of Puerto Rico, sitting by designation.

HOWARD, Circuit Judge.

Defendants-appellants Shell Oil Company, Shell Oil Products Company (collectively, "Shell"), and Motiva Enterprises appeal jury verdicts against them on several claims relating to their treatment of plaintiffs-appellees (the "Dealers"), franchisees and operators of Shell-branded service stations. Shell and Motiva (together, "the defendants") challenge the legal basis for verdicts against them under a federal statute designed to protect franchisees, as well as the verdicts under Massachusetts state law. Additionally, they appeal the jury's damages determinations as without sufficient basis in the evidence. We affirm in part and reverse in part.

## Facts

We recite the facts in the light most favorable to the jury's verdict. *See Rodriguez-Torres v. Caribbean Forms Mfr., Inc.*, 399 F.3d 52, 56 (1st Cir. 2005).

Shell maintained a network of franchisees in Massachusetts. Plaintiffs were eight of these franchisees. In 1998, Shell, Texaco, and Star Enterprises formed defendant Motiva, and Shell transferred the franchise relationships to that entity, assigning its rights and duties under the relevant contracts to Motiva.[1] Shortly thereafter, Motiva replaced the Variable Rent Program ("VRP") with the Special Temporary Incentive Program ("STIP"). Each of these programs (collectively, the "Subsidy") provided for reduction of the contract rent through sales of

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[1] The Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801-2806 (the "PMPA"), defines "franchise" as the collection of agreements relating to three elements: the lease of the premises, the license to use the franchisor's trademark, and the agreement governing the supply of branded motor fuel. *Id.* § 2801(1). These three elements are sometimes referred to as the "statutory elements of the franchise."

gasoline; once the specified threshold gallonage was sold in a given month, the contract rent for the next month would be discounted by a certain amount for every gallon sold in excess of that threshold. The threshold amount and the discount amount changed from time to time. The Subsidy had been in effect since 1982; it was renewed in an annual notice to franchisees, although its terms explicitly provided for cancellation with thirty days' notice. Various representations were made to the Dealers to the effect that the Subsidy or something like it would always exist, the contract rent was to be disregarded, and the cancellation provision was only intended to be invoked in a situation like a war or an oil embargo. Nevertheless, having given the required notice, Motiva ended the STIP on January 1, 2000, terminating the Subsidy. Without the Subsidy, the Dealers paid much more rent.

Motiva also offered new leases as the old leases expired. The new leases calculated rent differently than the old leases, resulting in a further increase in rent.

In accordance with their fuel supply contracts, the Dealers were charged a wholesale price for gasoline known as the Dealer Tank Wagon price (the "DTW price"). The fuel supply contracts were open price term contracts: the contracts were silent as to price, and one party set the price unilaterally. This price was set by the defendants, who calculated it by assessing the street prices of other competing gasoline stations in the area, and reducing those prices by the taxes levied on gasoline and an Estimated Industry Margin to approximate the wholesale price of the defendants' competitors.

**Proceedings Below**

Several franchisees, along with an unincorporated association called the Shell Dealers Defense Group (the "Defense Group"), filed for injunctive and declaratory re-

lief as well as damages on June 6, 2000. Compl., *Tsaniklides v. Shell Oil Products Co.*, 00-CV-11295. When the Defense Group was found to lack standing, a motion was made to add its members as individual plaintiffs. In denying that motion the district court indicated in a margin order, "[P]laintiffs may file a new case which may be deemed to be related." The individual franchisees filed a new suit on July 27, 2001, and the original suit was voluntarily dismissed on August 10. The new suit was assigned to the same district judge. The cases of New Hampshire and Rhode Island plaintiffs in the new action were transferred to those districts. From the sixty-four Massachusetts plaintiffs in the new suit, ten plaintiffs were chosen to go forward. One of those settled on the eve of trial and another lost at summary judgment. One plaintiff of the remaining eight, Mac's Shell Service, Inc., operated two stations that were sometimes treated as separate plaintiffs. Therefore, eight plaintiffs representing nine stations proceeded to trial.

The Dealers sued under a variety of theories. First, they contended that the Subsidy had been incorporated into the property leases, although the written leases purported to be integrated contracts under Massachusetts law. They claimed the amended contracts were then breached when Motiva eliminated the Subsidy. Under the Dealers' theory, this breach gave rise to two distinct claims: a state cause of action for breach of contract and a claim under the PMPA that Shell had improperly terminated the franchises when Shell assigned the franchise agreements to Motiva and Motiva terminated the Subsidy. Because no actual termination occurred, the Dealers proceeded under a theory of "constructive termination." Similarly, they claimed Motiva had "constructively nonrenewed" the franchise relationships in violation of

the PMPA (even though the franchises were in fact renewed) because the new contracts changed the rent-calculation method and increased the rent, along with other objectionable changes. Finally, the Dealers argued that Motiva failed to set prices for gasoline in good faith, as required for open price term contracts under Massachusetts law.

The defendants unsuccessfully moved for dismissal on all constructive termination claims and the constructive nonrenewal claims of two plaintiffs on the ground that they were time-barred. They also moved for a judgment as a matter of law on all claims. Following a jury verdict against them on all claims, they properly renewed this motion. They moved as well for a new trial and to set aside the jury's damages awards. The defendants now appeal the denial of all of these motions.

**The PMPA**

Congress enacted Title I of the PMPA to "remedy the disparity in bargaining power between franchisors and franchisees." S. Rep. No. 95-731, 95th Cong., 2d Sess. 18; *see also Four Corners Serv. Station v. Mobil Oil Corp.*, 51 F.3d 306, 310 (1st Cir. 1995). Because franchisees claimed that this unequal power was often wielded through arbitrary or discriminatory termination or nonrenewal, or *threats* of termination or nonrenewal, the PMPA aimed to remove this potent weapon from the franchisors' arsenal. S. Rep. No. 95-731, at 17 ("Numerous allegations have been made before Congressional committees investigating petroleum marketing problems that terminations and non-renewals, or threats of termination or non-renewal, have been used by franchisors to compel franchisees to comply with marketing policies of the franchisor."); *id.* at 18 ("[T]ermination of franchise agreements during the term as a remedy for contract vio-

lations has been repeatedly utilized."). The "PMPA attempts to level the playing field by restricting the grounds upon which a franchisor can assert a unilateral termination or nonrenewal of a franchise." *Id.*[2]

The PMPA makes a distinction between a "franchise" and the "franchise relationship." The franchise is a set of definite agreements for 1) lease of the premises, 2) the right to purchase gasoline for resale, and 3) the right to use the franchisor's trademark. 15 U.S.C. § 2801(1). "Franchise relationship" refers to the respective obligations of the franchisor and franchisee created by a franchise. *Id.* § 2801(2). The legislative history of the PMPA makes clear that "franchise" and "franchise relationship" were distinguished to drive home the fact that the franchise relationship survives the expiration of the agreements underlying the franchise. *See* S. Rep. No. 95-731, 95th Cong., 2d Sess. 30 ("The term 'franchise relationship' is utilized to avoid any contention that because the 'franchise' does not exist there is nothing to renew."). The structure and history of the PMPA emphasize Congress's view that the franchisees have a reasonable expectation that the franchises would be renewed and that the relationships would continue.

Accordingly, the PMPA forbids termination of a franchise or nonrenewal of a franchise relationship except under enumerated circumstances and with proper notice.

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[2] The PMPA is concerned not only with termination of a franchise agreement, but also with a franchisor's failure to renew such an agreement when it expires. Although the constellation of agreements (real property leases, fuel supply agreements, licenses to use franchisor's trademark) that make up the franchise are definite in term, the "[r]easonable expectations of the parties to a motor fuel franchise are that the relationship will be a continuing one." *Id.* This, of course, encourages franchisees to invest in their franchises and to build up goodwill that benefits both parties.

*See* 15 U.S.C § 2802(a) (nonrenewals and terminations generally prohibited); *id.* §§ 2802(b)(2)-(3) (grounds for termination and non-renewal); *id.* § 2804 (notice requirements). The PMPA provides a cause of action to franchisees who suffer termination or nonrenewal in violation of the relevant sections. *Id.* § 2805(a). As long as the action is brought within one year of the termination or nonrenewal complained of, *id.* § 2805(a)(1), the franchisee may seek preliminary injunctive relief, *id.* § 2805(b)(2), damages, *id.* § 2805(d), and "such equitable relief as the court determines is necessary," *id.* § 2805(b)(1). The PMPA mandates that preliminary relief "shall" be granted if the plaintiff shows 1) termination or nonrenewal and 2) "sufficiently serious questions going to the merits" that are "a fair ground for litigation," and the court determines 3) that the balance of hardships tips in favor of granting the injunction. *Id.* § 2805(b)(2). In all private civil actions for termination or nonrenewal, it is the franchisee's burden to show termination or lack of renewal. *Id.* § 2805(c).

**Standard of Review**

We review the denial of judgment as a matter of law de novo as to issues of law. *See Rodriguez-Torres*, 399 F.3d at 57. As to matters of fact, we view the evidence in the light most favorable to the verdict, asking only whether a rational jury could on the basis of that evidence find as the jury has. *See id.* We review a denial of a motion for a new trial for "a manifest abuse of discretion." *United States v. George*, 448 F.3d 96, 101 (1st Cir. 2006). We "will order a new trial only if the verdict is against the demonstrable weight of the credible evidence or results in a blatant miscarriage of justice." *Whitfield v. Meléndez-Rivera*, 431 F.3d 1, 9 (1st Cir. 2005) (internal quotation omitted). We will uphold a jury award if it is a

result of "any rational appraisal or estimate of the damages that could be based on the evidence before the jury." *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1172 (1st Cir. 1994) (quoting *Anthony v. G.M.D. Airline Servs.*, 17 F.3d 490, 493 (1st Cir. 1994)). Because it is complex and requires some procedural background, we discuss the applicable standard of review for the statute of limitations claim within the discussion of that issue.

**Statute of Limitations**

The PMPA contains a one-year statute of limitations.[3] The district court found, and the defendants here do not contest, that the cause of action for constructive termination arose on January 1, 2000, when Motiva terminated the Subsidy. The defendants claim that all of the constructive termination claims are time-barred because this action was not filed until almost nineteen months later, on July 27, 2001.[4] The Dealers point out that in dismissing their motion to be added as plaintiffs to the old action, the district court gave them leave to file a new action "which may be deemed to be related" to the original complaint, and that the first action was not dismissed until after the second was filed.

The defendants filed a motion to dismiss for failure to state a claim on which relief might be granted, citing the

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[3] "[N]o such action shall be maintained unless commenced within 1 year after the later of—(1) the date of termination of the franchise or nonrenewal of the franchise relationship; or (2) the date the franchisor fails to comply with the requirements of section 102 or 103." 15 U.S.C. § 2805(a).

[4] In the light of our disposition of the constructive nonrenewal claims as a whole, it is unnecessary to complicate this analysis with the defendants' further claim that two of the lease renewals are also time-barred on the same theory.

lapse of time and the PMPA's statute of limitations. This motion was denied.[5]

Our review of the record indicates that the district court denied the motion to add the individual plaintiffs only because it granted the plaintiffs a right to file a new action that related back. We further conclude that had the district court allowed the motion to amend, the amended pleading would have related back under Federal Rule of Civil Procedure 15. In the light of this, two powerful reasons lead us to uphold the district court's resolution of this issue: first, all the purposes of Rule 15(c) are satisfied, if not its letter; and second, the district court was in a better position when it placed the case in this posture than we are now to assess whether the interests of justice are served by permitting this relation back.[6]

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[5] The Dealers assert, as they have since their opposition to the motion to dismiss, that this resolution of the motion to amend was the result of a compromise regarding discovery vis-à-vis the new parties. At oral argument, the defendants denied ever agreeing to such a solution.

[6] We note that this issue was disposed of below in the district court's denial of a motion to dismiss. The parties skirmish about whether such a denial may even be appealed after a jury trial. Where a denial of a motion for summary judgment is predicated on a genuine dispute over issues of material fact, such a denial is not normally reviewable in this circuit after a "full-dress trial." *Lama v. Borras*, 16 F.3d 473, 476 n.5 (1st Cir. 1994). The Dealers argue, with reason, that this would apply *a fortiori* to a denial of a 12(b)(6) motion. *See Bennett v. Pippin*, 74 F.3d 578, 585 (5th Cir. 1996) ("When the plaintiff has prevailed after a full trial on the merits, a district court's denial of a Rule 12(b)(6) motion becomes moot."). But here the question is one of law—whether relation back can be applied outside of the strict confines of Rule 15(c). We think it likely that this changes the analysis, but because we ultimately hold that relation back was appropriate, it makes no difference: even assuming that the issue was properly preserved, the statute of limitations argument

Federal Rule of Civil Procedure 15(c) provides that an amended pleading may be deemed to "relate back" for statute of limitations purposes to the date of the pleading if certain conditions are met. The defendants rightly point out that Rule 15 concerns amended pleadings, not new pleadings in separate actions. "Rule 15(c) simply does not apply where, as here, the party bringing suit did not seek to 'amend' or 'supplement' his original pleading, but, rather, opted to file an entirely new [action] at a subsequent date." *Neverson v. Bissonnette*, 261 F.3d 120, 126 (1st Cir. 2001) (noting that a dismissal without prejudice leaves the plaintiff "in the same situation as if [the] first suit had never been filed" for purposes of Rule 15(c)). We note that this case differs from *Neverson* in that here the dismissal of the previous action did not occur until *after* the new pleading was filed, and we note further that the district court expressly suggested a new action be filed at the very moment it denied leave to amend the complaint in the first action.

Acknowledging that the letter of Rule 15 is not met here, we conclude that the rule nonetheless does provide some guidance. Rule 15(c) is "intimately connected with the policy of the statute of limitations." Fed. R. Civ. P. 15(c), advisory committee note. The purpose of statutes of limitations is to avoid the difficulties inherent in litigat-

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fails. We express no view as to whether in the general case a denial of a 12(b)(6) motion may be appealed after a jury trial; we move on to discuss the relation-back issue only because we think it important to consider whether the district court acted properly in acting outside the letter of the Federal Rules of Civil Procedure. In conducting this analysis, we apply de novo review to the pure legal question. Finding, as we do, that as a matter of law such relation back is within the power of the district court, we then review the decision to grant relation back for abuse of discretion. The finding of facts necessary to that conclusion we review for clear error.

ing matters long past, and to provide repose to potential defendants regarding such matters. *See Nelson v. County of Allegheny*, 60 F.3d 1010, 1014 (3d Cir. 1995) ("Statutes of limitations ensure that defendants are protected against the prejudice of having to defend against stale claims, as well as the notion that, at some point, claims should be laid to rest so that security and stability can be restored to human affairs.") (internal quotation omitted). The defendants at no time could have expected or enjoyed repose regarding these matters. The denial of the motion to add the specific Dealers to the original litigation was accompanied in the same breath by notice that a new complaint might be filed under the same facts. This occurred in a timely fashion. And the first litigation was not dismissed until after the second one was filed. No evidence of sandbagging was brought forward, nor do we infer any prejudice to the defendants on this record.[7]

Here, the Dealers had sought to vindicate their rights as the Defense Group, but lacked standing in that guise. In denying a motion to add the plaintiffs to the original litigation, the district court indicated it would allow a new filing to relate back to the date of the old one. It seems clear that the district court could instead have allowed the pleadings to be amended to name the plaintiffs individually. While we cannot say with certainty why one course of action was to be preferred over another, we are confident that the district court did not abuse its discretion.

Rule 15(c) does not specifically contemplate the substitution of plaintiffs. *See* Fed. R. Civ. P. 15(c), advisory committee note ("The relation back of amendments

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[7] We note also that the record is replete with delays by the defendants, and to that extent their equitable claim to the benefits of a speedy process is attenuated.

changing plaintiffs is not expressly treated in revised Rule 15(c), since the problem is generally easier."). But this is not a bar to relation back here either; assuming that the general principles of Rule 15 are to govern this admittedly unusual situation, we find that substituting plaintiffs here wreaks no injustice.

> [W]e have laid down three separate requirements applicable to plaintiffs who seek succor under Rule 15(c)(3): The amended complaint must arise out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading; there must be a sufficient identity of interest between the new plaintiff, the old plaintiff, and their respective claims so that the defendants can be said to have been given fair notice of the latecomer's claim against them; and undue prejudice must be absent.

*Young v. Lepone*, 305 F.3d 1, 14 (1st Cir. 2002) (quoting *Allied Int'l v. International Longshoremen's Ass'n*, 814 F.2d 32, 35-36 (1st Cir. 1987)). Accepting, as the district court did, that the Dealers were members of the Defense Group,[8] these factors are met here. The district court's factual conclusion does not represent an abuse of discretion, and so we adopt it.

The original complaint states the same causes of action, arising from the same events, as the new complaint. The Dealers have always claimed that they were all members of the Defense Group. That organization was established only to assert its members' rights and protect

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[8] The Dealers presented testimony on this issue at trial. While that testimony was of course not available to the district court when it decided the motion to amend in *Tsaniklides* and the motion to dismiss in this case, it does help to corroborate the district court's determination.

their interests, and so we find sufficient identity of interest to put the defendants on notice of the claims against them. And there is no undue prejudice where the Dealers are simply asserting themselves a claim they had made through a proxy well within the statute of limitations. Had the motion to amend been granted, and the individual plaintiffs named, relation back would have been within the district court's discretion. The district court, then, properly allowed the relation back of the new case to the previous one, and therefore did not err when it denied the motion to dismiss.[9]

**State Contract Claim**

The defendants appeal the jury's determination that the leases were orally amended to include the Subsidy, and therefore when the Subsidy was ended, the leases were breached. First, the defendants contend that the leases were completely integrated, meaning oral representations before or during the execution of the contract must be excluded by the parol evidence rule. Second, they claim that even if the leases were not integrated, the jury had insufficient evidence to conclude that the leases were amended to include a promise to continue the Subsidy.

The defendants argue as an initial matter that the leases were completely integrated agreements. The leases indisputably represented that they were integrated agreements and that any subsequent modification had to

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[9] The Dealers provide two alternate theories on which to uphold the denial of the motion to dismiss: equitable estoppel and equitable tolling of the statute of limitations. Because the district court denied the motion to dismiss on the basis of relation back, we have found it most convenient to follow that analysis here. We note only that all of these approaches address the fundamental issue of whether defendants suffer undue prejudice as a result of delay or lack of notice.

be in writing. The defendants claim the integration clause operated to insulate the leases from oral representations made prior to or contemporaneous with execution. But a document is not integrated merely because it says so. *See* Restatement (Second) of Contracts § 209 cmt. b (1981) ("Written contracts, signed by both parties, may include an explicit declaration that there are no other agreements between the parties, but such a declaration may not be conclusive.").

In Massachusetts, "the question of integration is one of fact reserved for the trial judge, whose resolution of that issue will not be reversed unless clearly erroneous." *Cambridgeport Sav. Bank v. Boersner*, 413 Mass. 432, 436 n.7 (1992); *Antonellis v. Northgate Constr. Corp.*, 362 Mass. 847, 850-51 (1973) (even absent specific evaluation of evidence by trial judge, finding of non-integration upheld as not clearly erroneous); *Alexander v. Snell*, 424 N.E.2d 262, 264 (Mass. App. Ct. 1981); *accord Brennan v. Carvel Corp.*, 929 F.2d 801, 807 (1st Cir. 1991) ("[U]nder Massachusetts law, the determination of whether a contract is completely or partially integrated, or whether a second contract is collateral to an integrated agreement, is a question of fact to be decided in the first instance by the trial judge.").[10]

Here, the district court did not make a specific finding about integration, but the charge to the jury on amend-

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[10] We are not governed by state practice as to the division of labor between judge and jury, even in diversity cases, *see Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 538 (1958), but in all events federal practice likewise lets judges determine whether an agreement is integrated, *Merk v. Jewel Food Stores Div. of Jewel Cos.*, 945 F.2d 889, 893 (7th Cir. 1991) (applying federal common law of contracts and holding that '[w]hether a writing is fully integrated is generally a question of law to be resolved by a court").

ments compels the inference that the agreements were not integrated. The jury was instructed to consider what the parties said and did concerning the lease; because the instruction did not exclude actions prior to or contemporaneous with the execution of the written lease, the district court must have concluded that the lease was not an integrated agreement.

After review of the record, we cannot say that this determination was clear error. The Subsidy was explained to each plaintiff in documents accompanying the lease, and many plaintiffs testified they regarded the Subsidy as essential to their businesses. There was evidence that the defendants said that the Subsidy was intended to be permanent, that the 30-day-notice provision was only in place for cases of war or embargo, and that the Dealers could rely on the continuation of the Subsidy or something like it. The district court therefore had ample evidence before it to determine that the lease was not an integrated agreement.

Because the leases were not integrated, they could be varied by mutual agreement. "Mutual agreement on modification of the requirement of a writing may . . . be inferred from the conduct of the parties and from the attendant circumstances." *First Pa. Mortg. Trust v. Dorchester Sav. Bank*, 395 Mass. 614, 625 (1985) (internal quotation omitted). The defendants assert that the evidence was insufficient to allow the jury to decide, as it did, that a promise to continue the Subsidy was incorporated into the leases. The district court instructed the jury: "[Y]ou may consider what each one said, one to the other, how they behave[d], what each did, what each knew and what the circumstances were . . . then you may infer . . . from their statements and their conduct . . . whether both Shell and each plaintiff agreed to amend

the leases." Evidence adduced at trial included not only representations made directly to the Dealers that the Subsidy or something like it would always be available, but also internal Shell documentation indicating that the Subsidy was intended to be permanent, that franchisees should plan their businesses around the continued availability of the Subsidy, and that franchisees would understand the loss of the Subsidy to be a breach of a promise by Shell. A rational jury viewing this evidence might come to the conclusion that the leases were amended to include the Subsidy.

**Constructive Termination**

The Dealers claimed that when Motiva breached their leases by eliminating the Subsidy, that breach perfected a constructive termination by Shell. The PMPA allows assignment of duties in franchise agreements in accordance with state law. *See* 15 U.S.C. § 2806(b). But an assignment that is violative of state law, or one that results in a breach of one of the statutory components of a franchise, gives rise to a claim under the PMPA against the original franchisor/assignor. In the words of the Fourth Circuit, "A franchisor cannot circumvent the protections the [PMPA] affords a franchisee by the simple expedient of assigning the franchisor's obligation to an assignee who increases the franchisee's burden . . . ." *Barnes v. Gulf Oil Corp.*, 795 F.2d 358, 362 (4th Cir. 1986) (reversing summary judgment and holding that where assignee breaches franchise agreement, action will lie against franchisor/assignor). In *Chestnut Hill Gulf v. Cumberland Farms, Inc.*, 940 F.2d 744 (1st Cir. 1991), we adopted the test for constructive termination articulated by the Sixth Circuit.

> To sustain a claim, under the PMPA, that a franchisor assigned and thereby constructively termi-

> nated a franchise agreement, the franchisee must prove either: (1) that by making the assignment, the franchisor breached one of the three statutory components of the franchise agreement, (the contract to use the refiner's trademark, the contract for the supply of motor fuel, or the lease of the premises), and thus, violated the PMPA; or (2) that the franchisor made the assignment in violation of state law and thus, the PMPA was invoked.

*Id.* at 750-51 (quoting *May-Som Gulf, Inc. v. Chevron U.S.A., Inc.*, 869 F.2d 917, 922 (6th Cir. 1989)).

What set *Barnes* apart from both *Chestnut Hill Gulf* and *May-Som Gulf* was that in *Barnes* the assignment of the contract had resulted in gasoline prices above the price specified in the contract; in other words, *Barnes* concerned a breach of one of the statutory elements of the franchise, the agreement for the supply of branded motor fuel. The Fourth Circuit vacated summary judgment for the defendant, holding that the breach of the contract for the supply of gasoline created a constructive termination of the franchise. In *Chestnut Hill Gulf* we held the PMPA was not implicated because there was no evidence that any of the statutory components of a franchise had been breached. "[A]ll thirteen dealers continued to occupy the same service stations under the same leases; they continued to purchase Gulf brand gasoline under the same supply agreements; and they continued to do business under the same Gulf trademark." *Chestnut Hill Gulf*, 940 F.2d at 752. In *May-Som Gulf*, the defendants were entitled to summary judgment because the plaintiffs had merely complained of *potential* breaches to the franchise agreement. In the case before us, the Dealers have proven to the jury's satisfaction that Motiva breached the lease component of the franchise agree-

ments. That breach allowed the jury to find that Shell constructively terminated the Dealers' franchises when it assigned the franchises to Motiva.

The defendants argue that in order to show a constructive termination, the breach must be contemporaneous with the assignment and the breach must amount to a total deprivation of one of the three elements of the franchise. Both contentions misunderstand constructive termination.

First, we agree with the Fourth Circuit that an action for constructive termination lies against the assignor of a franchise when the assignee breaches the franchise. *Barnes*, 795 F.2d at 362. This prevents the assignor/franchisor from shielding itself against liability through the use of another corporation. "The [PMPA] does not contemplate that a franchisee should be relegated to seeking damages from an assignee that might not have the resources to satisfy a judgment." *Id.* A delay between the assignment and the breach changes nothing. The reasons for this are even stronger where the assignee is a subsidiary of the franchisor, or a joint venture in which the franchisor is a party.

Second, the breach of the statutory element of the franchise does not have to be a total breach. In *Barnes* the plaintiff was "forced to raise her prices, and her sales and net income . . . declined." *Id.* at 361. She did not suffer a complete loss of the benefits of the motor fuel supply contract. The defendants' attempted analogy to constructive termination in employment law or constructive eviction in landlord-tenant law is misleading. Those doctrines require an actual severance of the relationship: The employee must leave the workplace; the tenant must move out. But here, as the Dealers testified, sunk costs, optimism, and the habit of years might lead franchisees

to try to make the new arrangements work, even when the terms have changed so materially as to make success impossible. Indeed, some plaintiffs testified they had gone into personal debt, driven themselves into bankruptcy, or enlisted the aid of family members working without pay to make ends meet. To require an actual abandonment of years of work and investment before we recognize a right of action under the PMPA would be unreasonable. The "congressional plan would be frustrated by requiring a franchisee to go out of business before invoking the protections of the PMPA." *Pro Sales, Inc. v. Texaco, U.S.A.*, 792 F.2d 1394, 1399 (9th Cir. 1986).

We do not here say that any material breach of the lease would necessarily be sufficient to sustain the constructive termination claim. In this case, the district court instructed the jury that it could find constructive termination only if the breach of the lease "was such a material change that it effectively ended the lease, even though the plaintiffs continued to operate the business .... It's not simply was the lease breached, but did that breach amount to ... effectively the end of the franchise relationship." In this instruction the district court set an appropriate threshold.

We agree with the district court that an assignor may be liable for even a subsequent breach of the franchise agreement by an assignee, and that a breach of the franchise agreement need not result in complete deprivation of a statutory element of the franchise to support a constructive termination.

Indeed, this case presents a strong argument for the doctrine of constructive termination. At trial the Dealers argued that Shell assigned the franchise agreements to Motiva, even *created* Motiva, in order to squeeze them

out of their franchises. They presented evidence that this was the reason for the change in the rent formulation, the elimination of the Subsidy, and the dramatic increase in rents they paid. If the jury accepted this as the reason, the case falls within the scope of the PMPA, which is designed not to freeze the franchise agreements exactly where they were,[11] but to prevent franchisors from improperly terminating franchises and thereby to ensure that franchisees benefit from successful investment in their franchises.

This same protection for franchisee expectations underlies the PMPA's requirement that a franchisor make a bona fide offer, or grant a right of first refusal, to the franchisee when the franchisor contemplates withdrawing from the relevant market, selling the underlying real property, or dedicating the property to another use. 15 U.S.C. § 2802(b)(2)(E) & (b)(3)(D). This is also why parts of the PMPA place more restrictions on franchisors when the purpose of termination or nonrenewal is to convert the station to direct operation by the franchisor.[12] Were

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[11] *See May-Som Gulf*, 869 F.2d at 921-22 (noting that the PMPA does not mandate "a permanent status quo" and that the act was not meant to stymie "major national acquisition and large scale divestiture") (quoting *Russo v. Texaco, Inc.*, 630 F. Supp. 682, 683 (E.D.N.Y. 1986)).

[12] For example, subsection 2802(b)(2)(E) requires that a termination made pursuant to a franchisor's withdrawal from "the marketing of motor fuel through retail outlets in the relevant geographic market area" be "not for the purpose of converting the premises . . . to operation by employees or agents of the franchisor for such franchisor's own account." For another example, nonrenewals are normally allowed if they are based on determinations "to materially alter, add to, or replace such premises," or determinations that the franchise "is likely to be uneconomical despite any reasonable changes . . . which may be acceptable to the franchisee." But subsection 2802(b)(3)(D)(ii) explicitly prohibits nonrenewal under those

it otherwise, the franchisor could extract any increase in value created by the franchisee's investment, without sharing that increase with the franchisee. This would dampen the incentive for a franchisee to develop the business. In this case, the Dealers presented evidence that the defendants wanted to convert their stations to direct operation.[13] Where a franchisor has breached its obligations to the franchisee such that the franchisee faces the effective end of the franchise, the PMPA must treat that as a termination of the franchise.

Neither will we contradict the jury's verdict. When we are satisfied that the law has been faithfully interpreted, we will overturn a jury's verdict only when no reasonable jury could have come to that verdict on the facts presented. *See Rodriguez-Torres*, 399 F.3d at 57. The jury heard ample evidence to conclude that the financial hardship resulting from the loss of the Subsidy meant the end

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same circumstances when that determination is "made for the purpose of converting the leased marketing premises to operation by employees or agents of the franchisor." This language forbids termination or nonrenewal under these circumstances *even if* the right of first refusal is given or the bona fide offer is made. (This restriction does not apply to sales of the premises, perhaps because the drafters of the legislation did not imagine that the sale of the underlying premises could be for the purpose of converting the station to the franchisor's control. *But cf. Patel v. Sun Co.*, 141 F.3d 447 (3d Cir. 1998) (when franchisor sells underlying property with leaseback provision to operate service station, PMPA implicated in neither the sale of the property nor the termination of the franchise on expiration of the franchisor's lease).[)]

[13] Nothing in the PMPA would prevent the defendants from buying the Dealers out. What the PMPA does forbid is franchisors using their power to dictate impossible franchise terms in order to force the franchisees to walk away from their investments or to sell them at artificially low prices. That is exactly what the Dealers claimed was happening here.

of the relationship. The defendants had opportunity to attack the credibility of that evidence and to put on their own. We will not step into the jury box to provide a second opinion. Nor was the verdict against the demonstrable weight of the evidence or likely to result in a blatant miscarriage of justice. Consequently, there was no manifest abuse of discretion in the district court's denial of the motion for a new trial.

**Constructive Nonrenewal**

As each Dealer's lease expired, Motiva presented a new lease. The new leases changed the way rent was calculated, which had the effect of increasing the rents charged. The Dealers argued that this change and others were not made in good faith, as required by the PMPA, but rather were part of the plan to drive the franchisees out of business. They claimed that inclusion of these terms amounted to a nonrenewal of their agreements, even though each Dealer signed a new agreement (albeit "under protest"). We conclude that the PMPA does not support a claim for nonrenewal under these circumstances. We therefore vacate this portion of the district court's judgment and remand with instructions to issue judgment on this claim for the defendants.

It is the plaintiffs' burden to prove that a nonrenewal or a termination has taken place. 15 U.S.C. § 2805(c). A notice of nonrenewal issued pursuant to 15 U.S.C. § 2804, while not strictly speaking a nonrenewal, presumably satisfies this burden. *See Dersch Energies, Inc. v. Shell Oil Co.*, 314 F.3d 846, 864 (7th Cir. 2002) ("[A] franchisor's issuance of a notice of nonrenewal is the precise equivalent of a nonrenewal."); *Lippo v. Mobil Oil Corp.*, 776 F.2d 706, 720 (7th Cir. 1985) ("In an action brought under section 2805(a) the franchisee has the burden of proving termination of the franchise. (This must really

mean attempted termination if the injunctive relief is to be of any use.)"). *But see Seckler v. Star Enter.*, 124 F.3d 1399, 1403 (11th Cir. 1997) (no claim under PMPA when notice of nonrenewal rescinded before action commenced); *Akky v. BP Am.*, 73 F.3d 974, 974 (9th Cir. 1996) (same).

The threshold question is whether to recognize such a "constructive nonrenewal" and thereby bring Motiva's actions within the reach of the PMPA. The Ninth Circuit is the only circuit so far to recognize a claim for constructive nonrenewal. *Pro Sales*, 792 F.2d 1394. In *Pro Sales*, the plaintiff signed a renewal agreement "under protest" and immediately brought suit under the PMPA. *Id.* at 1398. The court relied on legislative history to conclude that these facts gave rise to a claim for constructive nonrenewal under [the] PMPA. *Id.* at 1399.

*Pro Sales* has been rejected by the other circuits to consider the issue. The PMPA, after all, requires a franchisor to provide a notice of nonrenewal, 15 U.S.C. § 2805(c), and then provides a framework for the franchisee to seek preliminary relief on receipt of that notice, *id.* § 2805(b)(2). Two circuits have held that this notice-and-preliminary-relief structure is evidence that Congress intended to limit the reach of the PMPA to cases where either a notice is given or an actual nonrenewal has taken place. *See Abrams Shell v. Shell Oil Co.*, 343 F.3d 482, 489 n. 16 (5th Cir. 2003) ("[T]he Seventh Circuit rejected the *Pro Sales* approach based on a 'franchisee's ability to obtain an injunction under the PMPA' in cases of nonrenewal. We reject the *Pro Sales* approach on the same basis." (quoting *Dersch Energies*, 314 F.3d at 865)). Thus, in *Dersch Energies*, the Seventh Circuit held that a franchisee who had signed a renewal "under protest" did not have a claim for constructive nonrenewal because the

franchise had in fact been renewed. "Had Dersch allowed the defendants to issue a formal notice of nonrenewal, its dispute with the defendants would have been transformed from a mere contract dispute into a nonrenewal (within 90 days) of its franchise relationship—thus allowing it to . . . maintain suit" under the PMPA. *Id.* at 866; *accord Abrams Shell v. Shell Oil*, 343 F.3d 482, 489 (5th Cir. 2003) ("We find the Seventh Circuit's reasoning in *Dersch Energies* to be especially persuasive, thus we apply the same logic to this case. Plaintiffs have not provided any evidence that Defendants failed to renew the relevant agreements; therefore, Plaintiffs have not shown a breach in the franchise relationship.").

The plaintiffs' constructive nonrenewal argument requires the following reasoning. Had the Dealers refused to agree to the new contract terms, Motiva would have issued notices of nonrenewal alleging as a permissible basis for nonrenewal the "failure of [the parties] to agree on changes or additions to the provisions of the franchise . . . ." 15 U.S.C. § 2802(b)(3)(A). The Dealers would have asserted that the nonrenewal was improper because the changes were not offered in good faith, *id.* § 2802(b)(3)(A)(i), or else were offered in order to convert the premises to the franchisor's own control, *id.* § 2802(b)(3)(A)(ii). On those grounds the Dealers could have sought preliminary relief and damages under the PMPA. *Id.* § 2805(a) & (b).

The stumbling block that trips up the plaintiffs is that, rather than insist on receiving notices of nonrenewal, the Dealers signed the new agreements "under protest" and continued in operation under the new agreements. We conclude that just as the PMPA requires a clear indication from franchisors that they seek nonrenewal of a franchise relationship, it likewise requires that franchi-

sees faced with objectionable contract terms refrain from ratifying those terms by executing the contracts (even "under protest") and operating under them. Allowing a franchisee to sign "under protest" and then later challenge the renewal would extend the period of uncertainty through the entire first year of a contract that in this case was only three years. Recognizing constructive nonrenewal also would enable a franchisee to sign the contract and simultaneously challenge it. If its claims were rejected by the courts, the franchisee would have lost nothing and could continue to operate the franchise under the agreement with the PMPA-enforced reasonable expectation of continuation and renewal. Absent a claim for constructive nonrenewal, a franchisee must wait for a notice of termination to bring suit under the PMPA. The franchisee therefore risks the end of the franchise if the claim fails and so must carefully weigh the decision to sign or sue.[14] This is the balance Congress has struck, and should we prefer another, we would not be free to impose it. Consequently, we reject application of constructive nonrenewal to these facts.

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[14] In *Pro Sales* the suit was filed immediately and the plaintiff obtained preliminary relief so that it never operated under the new contract. This is different from *Dersch Energies*, where the plaintiff operated under the new contract "for just under a year" before filing suit. 314 F.3d at 865. The *Dersch* court noted the distinction, but found it irrelevant. *Id.* We do not address the question whether a preliminary injunction enabling the franchisee to avoid operating under the new agreement combined with an immediate suit, as in *Pro Sales*, would satisfy the requirements for bringing suit under the PMPA. Such a case would avoid several of the problems we have identified, but would still allow a franchisee to challenge an agreement as a nonrenewal while retaining the right to take advantage of that agreement should the challenge fail. We hold only that under the facts before us today we cannot recognize a claim for constructive nonrenewal.

We note with some concern the limited scope of the PMPA. Two unexpected consequences of the legislation seem to loom as potential problems. The first is that franchisors will conform their behavior to the letter of the law but still use their position of power to impose their will on franchisees. The statute is of course not a panacea and cannot be faulted for what it fails to do. But some statutory protection is worse than none when it serves as protective cover for the very misdeeds it purports to eliminate. The second unintended consequence is that, to the extent Congress succeeds in leveling the playing field, it makes the franchise arrangement less appealing to franchisors. It is not difficult to imagine protections for franchisees so strong that franchisors abandon the model entirely. Evidence introduced at trial spoke to both of these hazards. However, these are issues for Congress to weigh and remedy, not for the courts.

Because we do not recognize a claim for nonrenewal under the PMPA where the franchisee has signed and operates under the renewal agreement complained of, we vacate this portion of the district court's judgment and remand with instruction to enter judgment on this count for the defendants.

**Unreasonable Gasoline Prices**

The Uniform Commercial Code, as adopted in Massachusetts, contemplates the enforcement of contracts in which one party sets the price of goods over time. Mass. Gen. Laws ch. 106, § 2-305(2). But the price must be set in good faith. *Id.* The jury found that the defendants had failed to set reasonable prices in good faith. The defendants appeal on two grounds. First, they claim that the "good faith" requirement means only that such a price

may not discriminate among similarly situated buyers.[15] And second, the defendants assert that the Dealers' evidence of unreasonable pricing is inadequate as a matter of law, because 1) it was based only on retail pricing charged by competitors to the Dealers, rather than DTW prices charged to those competitors; and 2) the Dealers' expert presented pricing analysis of only one competitor, thereby failing to establish a "range" of prices outside of which the defendants' wholesale prices fell. We find neither contention persuasive.

Section 2-305(2) "rejects the uncommercial idea that . . . the seller . . . may fix any price he may wish by the express qualification that the price so fixed must be in good faith. Good faith includes observance of reasonable commercial standards of fair dealing . . . ." *Id.* § 2-305(2) cmt. 3; U.C.C. § 2-305(2) cmt. 3. "[I]n the normal case a 'posted price' or a future seller's or buyer's 'given price,' 'price in effect,' 'market price,' or the like satisfies the good faith requirement." *Id.* The defendants and amici urge us to read this comment as providing an absolute safe harbor for nondiscriminatory posted prices in open price term contracts. This we will not do.

For one thing, the very comment on which the defendants and amici rely expressly invokes the general notion of "reasonable commercial standards of fair dealing." If the comment meant that only discriminatory pricing would be disallowed it certainly could have said that. For another, it is clear to us that a situation in which one merchant is raising its prices in order to force a customer out of business is hardly the "normal case." The Eleventh Circuit allowed this question to go to a jury in a class ac-

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[15] In this assertion they are supported by amici, whose brief is gratefully acknowledged.

tion involving another oil company's pricing policies. *Allapattah Servs. v. Exxon Corp.*, 333 F.3d 1248, 1262 n.16 (11th Cir. 2003) (conceding that in a "normal case" nondiscriminatory pricing is protected, but holding that where the allegation was that an oil company was trying to drive service stations out of business, "whether this case constituted a normal case was a factual issue necessary to determine whether Exxon acted in good faith" and therefore rightly submitted to the jury). More recently, the Fifth Circuit upheld the denial of a motion for judgment as a matter of law on the basis that setting gasoline prices in bad faith to drive franchisees out of business violated the UCC. *Mathis v. Exxon Corp.*, 302 F.3d 448, 457-59 (5th Cir. 2002) ("[T]he jury's finding that Exxon breached its duty of good faith in setting the DTW price it charged the plaintiffs is not without foundation in the law or the evidence."); *see also Bob's Shell, Inc. v. O'Connell Oil Assocs.*, 2005 U.S. Dist. LEXIS 21318 (D. Mass. Aug. 31, 2005); *Wayman v. Amoco Oil Co.*, 923 F. Supp. 1322, 1349 (D. Kan. 1996) (finding that the case before it was a "normal case" but noting that "[i]f there was evidence that Amoco had, for example, engaged in discriminatory pricing or tried to run plaintiffs out of business, then the court's decision might be different"). *But see Shell Oil v. HRN, Inc.*, 144 S.W.3d 429, 435-38 (Tex. 2004) (holding absence of price discrimination created presumption of good faith notwithstanding allegations that that oil company set prices in bad faith as part of a plan to drive franchisees out of business).

Commerce is predicated on the idea that a transaction is good for both buyer and seller. The comment recognizes that allowing one party complete control over the price would be "uncommercial." We do not think the only reason for this is the risk of price discrimination. The

drafters of the UCC and amici here are rightly concerned about a flood of litigation second-guessing every price set in an open price term contract. Mere allegations of bad faith will never be enough to survive summary judgment. But this case comes to us after a jury verdict finding bad faith and commercial unreasonableness.

Nor do the defendants' objections to the sufficiency of the evidence require us to set the jury verdict aside. While perhaps more specific and more comprehensive evidence would be preferable, the jury had enough evidence of the defendants' motives and practices, as well as enough information about competitors' pricing, to come to the conclusion that the DTW prices were commercially unreasonable. Specifically, the use of competing gas stations' retail prices to draw conclusions about what those stations might be paying for gasoline is not ideal, but is adequate to the task at hand. In fact, it is the same benchmark that the defendants used in their "street-back" pricing model in setting the DTW price in the first place. In the light of this, the defendants cannot be heard to complain that such prices are not a good measure of what other distributors of gasoline are charging. And although the Dealers' expert failed to present a "range" of such prices, the expert testimony was not the only testimony available. One Dealer testified that the *retail* prices he observed were equal to or lower than the *wholesale* prices he paid. Additionally, at least one Dealer had firsthand knowledge of the DTW prices charged in the same area by another franchisor. On appeal, the defendants put forward once again the contentions of their own experts regarding the range of prices set by competitors. But it was up to the jury to choose between these competing characterizations, and the jury did so.

**Damages**[16]

The defendants argue that the damages awarded for the PMPA constructive termination claim are not supported by sufficient evidence. The district court instructed the jury to calculate two kinds of damages: damages in the amounts of rents paid that were in excess of the rents under the Subsidy, and damages for reduction in the values of the Dealers' businesses. We agree with the district court that there was ample evidence in the record for the jury to make a damages award, and we uphold that award as reasonable.

The defendants claim that the damages are not supported by sufficient evidence for two reasons. First, the plaintiffs' expert used the VRP when calculating damages for excess rent, rather than the STIP, as would have been correct. Because the STIP was less generous, the expert's figures were probably too high. And second, the expert presented damages figures for lost business value, but those figures were based on excess rent paid under the new leases, not on the elimination of the Subsidy. Because this testimony applied properly only to damages under the constructive *nonrenewal* claim, the defendants say that a correspondence between the expert's figures and the actual awards for lost business value awarded under the constructive *termination* theory must be error. We address each of these in turn.

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[16] Damages for the state contract claim duplicate those for constructive termination under the PMPA. We discuss these damages only once, under the PMPA. Also, because we vacate the jury's verdict on the constructive nonrenewal claim, we do not consider the damages awarded under that claim. For the same reason, we do not address the defendants' argument on appeal that the awards for constructive termination and constructive nonrenewal were duplicative.

The judge instructed the jury to find damages for excess rent paid due to the elimination of the Subsidy and for the loss of value to the Dealers' businesses due to the increased rent and the higher gasoline prices.

Calculation of excess rent requires several predictions: of the Subsidy threshold amount, of the discount rate, and of how much gasoline the Dealers could have sold under the scheme. Aside from those assumptions it is a relatively certain calculation, on which expert testimony was received.[17] The Dealers' damages expert concededly used the VRP instead of the STIP to calculate damages, thereby potentially inflating the damages. But even if we could state with certainty that the damages were therefore inaccurate, that would not necessitate our remanding for a new damages calculation or our settling the matter ourselves. A clock that is five minutes fast is, strictly speaking, wrong. But it still may give a general sense of the time and thereby serve its purpose. And the damage figures provided by the expert are, after all, only guideposts for the jury.

Calculating the loss of business value, on the other hand, relies on many more intangible factors and requires many more assumptions. In this respect it is similar to calculating future lost profits, which we have previously held is a more speculative inquiry than normal economic damages calculations. *See, e.g., Camar Corp. v.*

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[17] Even this normally simple calculation is complicated somewhat in these circumstances. Higher rents may have forced the Dealers to maintain higher gasoline prices, which in turn might have lowered sales volume. The Subsidy reduced rents based on gasoline volume, so a change in that volume would render more uncertain even the damages on this element. (At least one of the Dealers testified that he would sometimes lower his gasoline prices because he could recoup the lost margin based on increased volume and the lowered rent provided by the Subsidy based on that volume.)

*Preston Trucking Co.*, 221 F.3d 271, 279 (1st Cir. 2000) ("[M]athematical precision is not required in calculating lost profits" but "a damages award must have a rational basis in the evidence." (internal quotation omitted)); *E. Mountain Platform Tennis v. Sherwin-Williams Co.*, 40 F.3d 492 (1st Cir. 1994) (upholding as not erroneous a jury's award of future lost profits where the company was only "at a break-even point" and operations were not yet profitable). We reject the defendants' comparison of this case to *Kolb v. Goldring*, 694 F.2d 869, 873 (1st Cir. 1982). That case dealt with lost wages, in a statutory setting that limited recovery to "accounts owing" on a similar footing as a "common law suit for back wages for breach of contract." *Id.* at 871-82. Here, the plaintiffs are entitled to the loss of the value of their business as a result of the defendants' actions.

Because that calculation is necessarily complex and uncertain, we require from the jury less rigor in making the award. Here, along with expert testimony, the Dealers presented testimony that the defendants themselves had valued these stations more highly before the elimination of the Subsidy, and that some of the franchises had lost substantial value. We recognize the wide latitude afforded the jury in this situation—asked to make an uncertain calculation on little hard evidence—and we are mindful that we review to see only if no rational jury could have made this award. "[T]he assessment of damages cannot be disturbed unless the award exceeded any rational appraisal or estimate of the damages that could be based upon the evidence or was grossly excessive, inordinate, shocking to the [conscience] of the court, or so high that it would be a denial of justice to permit it to stand." *Consolo v. George*, 58 F.3d 791, 795 (1st Cir.

1995) (quotation marks and citations omitted). We decline to go so far.

The jury's awards largely correlate with the figures put forward by the Dealers' damages expert. We believe, as did the district court, that once the weaknesses in the expert's figures were pointed out in closing arguments and jury instructions, the jury nonetheless was free to use them as markers of probable damages. That the jury adhered closely to these numbers does not change the fact that the jury was aware of their inadequacies. The jury may have decided that they were close enough, or that no other method of calculation would be better. While a jury is not free "to pull figures out of a hat," *Kolb*, 694 F.2d at 873, we believe that the expert's testimony, the availability of the expert's background data, and the cautionary instruction issued by the district court gave enough guidance to the jury.

And the jury did not simply parrot the expert's figures in any event. In fact, where the jury *did* depart from the experts' figures, the defendants attack those departures as aberrations deserving of reversal. Three Dealers received awards in excess of the damage expert's calculations. The defendants characterize these as mystery "bonus" amounts unsupported by any view of the evidence. But each of these three Dealers testified to particular hardships that the jury might have thought indicated special reductions in business value. The jury may well have been performing its function in calculating losses in business value stemming from those hardships.

Similarly, we find that the jury had ample evidence to make a damages award for the claim under the open price term of the gasoline supply contract. That it differed in some particulars from the numbers put forward by the expert is immaterial, particularly where, as here,

different forms of evidence showed different pieces of this picture.

The award of attorneys' fees is mandated by the PMPA. Because we uphold only one of the two statutory claims, however, we must remand for a determination whether the failed constructive nonrenewal claim was a "severable" claim for the purpose of awarding attorney's fees. Such fees are normally not recoverable. *See Figueroa-Torres v. Toledo-Dávila*, 232 F.3d 270, 278 (1st Cir. 2000) (fees for unsuccessful severable claims normally not recoverable); *Coutin v. Young & Rubicam, P.R.*, 124 F.3d 331, 339 (1st Cir. 1997) (discussing framework for determining whether to reduce fees); *see also Hensley v. Eckerhart*, 461 U.S. 424 (1983). We are mindful both of the district court's discretion in this matter, and of the Supreme Court's admonition that determination of attorney's fees should not result in a second major litigation. *Hensley*, 461 U.S. at 437. But we have no basis here on which to make a judgment, and so we must remand.

**Conclusion**

The judgment of the district court on the state contract claims, the unreasonable gasoline pricing claims, and the constructive termination claims is **affirmed**. The judgment on the constructive nonrenewal claims is **reversed**. The jury awards as to the surviving claims are **affirmed** as rational awards supported by sufficient evidence. The award of attorney's fees and costs is **vacated** and **remanded** for reconsideration in the light of our mixed disposition of the claims under the PMPA. Costs on appeal are awarded to the appellees.

# UNITED STATES COURT OF APPEALS
# FOR THE FIRST CIRCUIT

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No. 05-2771

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FRANCIS MARCOUX, [ET AL.],
*Plaintiffs,*

CYNTHIA KAROL; SID P[RA]SHAD; JOHN A. SULLIVAN; MAC'S SHELL SERVICE, INC.; RAM CORPORATION, INC.; J&M AVRAMIDIS, INC.; AKMAL, INC.; THREE K'S, INC.; STEPHEN PISARCZYK,
*Plaintiffs-Appellees,*

v.

SHELL OIL PRODUCTS COMPANY LLC; MOTIVA ENTERPRISES LLC; SHELL OIL COMPANY, INC.,
*Defendants-Appellants.*

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Before Boudin, Chief Judge, Torruella, Lynch, Lipez and Howard, Circuit Judges, Delgado-Colon,* District Judge.

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## ORDER OF COURT

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Entered: May 23, 2008

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The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc have been submitted to the active

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* Of the U.S. District Court for the District of Puerto Rico, sitting by designation.

judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be *denied.*

By the Court:

/s/ Richard Cushing Donovan, Clerk